JD–61-03
Chicago, IL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

B & A ASSOCIATES, LLC

and Case 13–CA–40124–1

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 1, AFL–CIO, CLC

Daniel E. Murphy, Esq., for the General Counsel.
Bruce F. Mills, Esq., of Milwaukee, Wisconsin, for the Respondent.
Joseph E. Gumina, Esq., of St. Charles, Illinois, for the Respondent.
Librado Arreola, Esq., of Chicago, Illinois, for the Charging Party.

DECISION

Statement of the Case

Joseph Gontram, Administrative Law Judge. This case was tried in Chicago, Illinois on February 3 through February 5, 2003. The charge was filed April 17, 2002, was amended August 8, 2002, and the complaint was issued August 8, 2002. The complaint alleges that the Respondent violated Section 8(a)(1) by (1) interrogating its employees about their union activities, (2) making threats regarding the futility of union activity, (3) threatening to make changes in its employees' terms and conditions of employment, (4) threatening to subcontract its employees' work and to reduce its employees' hours of work if they selected a union, and (4) creating the impression that its employees' union activities were under surveillance. The complaint also alleges that the Respondent violated Section 8(a)(3) by terminating its employee, Gregory Mauer, because of his union activities.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Respondent, and the Union, I make the following

Findings of Fact

I. Jurisdiction

B & A Associates, LLC (the Respondent) is an Illinois limited liability corporation with offices in Schaumburg, Illinois. During the past calendar year, the Respondent derived gross revenues in excess of $500,000, and purchased and received at its Schaumburg facility goods valued in excess of $50,000 from points located outside the State of Illinois. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent also admits and I find that the Service Employees International Union, Local 1, AFL-CIO, CLC (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

The Respondent is engaged in the business of providing management services to apartment buildings in the Chicago, Illinois area. These management services include leasing the apartments, collection of rents, providing maintenance, customer service, and other matters related to the operation of apartment buildings. Among the buildings managed by the Respondent is an apartment building located at 1400 Lake Shore Drive, Chicago, Illinois. In March 2002, the Union began a campaign to organize the maintenance workers at various buildings in the Chicago area, including two buildings managed by the Respondent in downtown Chicago. These buildings are located at 1400 Lake Shore Drive (the Building) and at 14 West Elm Street. Gregory Mauer was the first maintenance worker at the Building to whom the Union organizer spoke on March 21, 2002. After the union organizers came to the Building on March 21, 2002, the Respondent held several meetings with its maintenance workers concerning the Union. On April 15, 2002,[1] the Respondent discharged Mauer.

A. Meetings with Maintenance Workers

At all times material to the events in this case, Nancy Farrell was the human resource manager of the Respondent, Cheryl Metz was the property manager for the Building,[2] Cindy Biogetti was the general manager of the Respondent, Sharon Sharpe was the service manager at the Building,[3] and Art Barajas was the lead mechanic at the Building. Human Resource Manager Nancy Farrell is responsible for the complete personnel policies and practices of the Respondent, including hiring, training, insuring adherence to company policies, benefit and safety programs, and firing. Her responsibilities extend to 10 different properties of the Respondent. Property Manager Cheryl Metz was responsible for maintaining the investment for the owner of the Building, overseeing all resident matters, including complaints, marketing and sales, public relations, and direct hands-on management of the Building. General Manager Cindy Biogetti was responsible for overseeing the portfolio of real estate investments for the Respondent, and she was also responsible for making and approving hiring decisions. Service Manager Sharon Sharpe was responsible for overseeing the work performed by the maintenance mechanics, the work orders and purchase orders at the Building, together with bill approval and paying. Lead Mechanic Art Barajas provided assistance to Sharpe, he had some supervisory responsibilities, and he provided assistance to the other mechanics. The rest of the maintenance staff was composed of the maintenance technicians or mechanics. The maintenance technicians received orders from and reported directly to Cheryl Metz and Sharon Sharpe.

Cindy Biogetti is the sister of Cheryl Metz and the aunt of Sharon Sharpe. Sharon Sharpe is the daughter of Cheryl Metz.

In the morning of March 21, Dan Schlademan, the director of organizing for the Union, together with another union organizer, came to the Building to initiate their effort to organize the

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[1] All dates are in 2002 unless otherwise indicated.

[2] Cheryl Metz received a promotion to regional manager in approximately February 2002. However, she remained the general manager of the Building until June 2002. (Tr. 396.) References to the transcript of the hearing are designated “Tr.”

[3] Sharon Sharpe has also been promoted by the Respondent and is currently the regional service manager. However, through April 15, 2002, she was the service manager at 1400 Lake Shore Drive.

maintenance workers at the Building. Schlademan talked to Mauer at the front desk in the main lobby of the Building. Mauer showed interest and support for the Union and its goals, and volunteered to help the Union in its organizing campaign. Mauer agreed to talk to his co-workers and to ask them to sign authorization cards. Mauer filled out an authorization card at the front desk and handed it back to Schlademan.

As Schlademan and Mauer were discussing these matters at the front desk, Art Barajas and Sharon Sharpe entered the lobby and observed them. The manager's office is directly behind the front desk, and Sharpe entered that office. As she passed Mauer, she said "good morning" to him. Mauer said to Schlademan that he wanted to keep their conversation quiet because he (Mauer) did not want to get into "trouble." Schlademan then departed, but he first gave Mauer approximately 10 blank copies of authorization cards so that he could attempt to sign up his coworkers. Thereafter, and up through April 14, Mauer did talk with his coworkers about joining the Union.

The next week, on March 27, the Respondent's managers advised the maintenance mechanics at the Building that management wanted to speak to every maintenance mechanic in separate, individual meetings in the Building's conference room. The conference room is on the first floor of the Building and often served as the location of meetings called by management. For example, Mauer had been called to a meeting in the conference room when Metz handed him the warning notice concerning his alleged absenteeism. Also, the conference room was where Farrell and Metz notified Mauer that he was being terminated.

Farrell and Sharpe conducted the March 27 individual meeting with Mauer. Farrell was present at all of the individual meetings, and Metz was present for some of the individual meetings. Farrell told Mauer that she knew the Union had been in the building and that the Union had already obtained the signatures of 50 percent of the maintenance staff. She asked Mauer whether he had talked to the union, and he acknowledged that he had spoken to the Union at the front desk. Farrell stated that the union was guilty of trespassing on the property and that the owner of B & A did not like or want the union and would not allow it on his property. She added that if the Union were to get into the Building, "then management and the partners would have to look at their options."[4] Farrell then asked Mauer whether he had signed anything. Mauer replied that he had not.[5] She then asked if he knew if anyone else had signed anything, and Mauer replied that he did not know. Farrell said that Mauer could talk to the union, as long as it was not on "company time."[6] She also asked Mauer what he thought of unions. He replied only that he had seen a few different unions over his working career.

After Farrell had talked to each of the maintenance workers individually, she called a

[4] Tr. 142.

[5] Maintenance mechanic Gzzim Bardic corroborates the fact that Farrell inquired about signing authorization cards for the Union, although Farrell's technique with Bardic was more subtle than it was with Mauer. Bardic states that in his individual meeting with Farrell and Metz, he was asked if he had been approached by the Union, and he responded, "yes." Farrell and Metz stated that they were not going to ask him if he had signed for the union, "but that was up to him." (GC Exh. 19.) Such a statement, although perhaps not formally a question, was in substance an inquiry and was clearly coercive because if Bardic elected not to tell them, he would reasonably fear incurring management's displeasure. In the face of this coercive atmosphere, Bardic responded that he had not signed a union card, even though he had signed one.

[6] Tr. 599.

meeting of the entire maintenance staff, which numbered approximately 6 maintenance mechanics. This meeting was also held in the conference room and was attended by Farrell, Metz, and Sharpe on behalf of management. Farrell again stated the Respondent's opposition to unions. She said that the employees could talk to the Union, as long as it was not on "company time." She said the Respondent "does not like unions, does not want unions, [and] will not allow unions in the building." She told the employees that they had the right to support the union, but that "the minute you guys go out to picket . . . we're going to be hiring other people to take your place." She also stated that she had knowledge that half of the employees had signed union authorization cards. As the employees shook their heads to indicate that they had not signed such cards, she said, "Well, if it's not you guys, then who is it?"[7] No one responded.[8]

Farrell testified that she called the meetings with the maintenance staff, at the request of Metz and Sharpe, in order to "put rumors to rest and put gossip to rest." Sharon Sharpe described it as "the guys would rumor and gossip . . . like high school girls about each other and they start rumors, and nothing in particular" or about "each other,"[9] as if the Respondent's Human Resource Manager were being called in to have individual meetings with all of the maintenance employees to address gossiping by such employees having nothing to do with work, much less the union. Farrell, however, acknowledged that Sharpe had called her concerning union discussions among the maintenance technicians. Sharpe "didn't like the rumors." Farrell stated that she did not have much concern about the union organizers. "I just thought I'd go down there and talk to our employees. My concern was not that high."[10]

The testimony by Farrell regarding her lack of concern about the union's activities, and by Sharpe regarding unspecified rumors being the reason for the scheduled meetings, are not credible.[11] Farrell made a special trip to the Building the next week after the union organizers were at the Building. She made this trip at the request of the two management persons that were at the property. She held individual meetings with every maintenance worker, as well as a general meeting with the maintenance staff. The timing and number of meetings demonstrate

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[7] All of the quoted statements in this paragraph are found at Tr. 144. See also the affidavit of Gzzim Bardic, GC Exh. 19.

[8] Bardic corroborates this statement and inquiry by Farrell in the general meeting. Bardic states that "I think that it was Nancy who stated [to] the group that they had been told that more than 50 percent of the employees had signed for the union, yet none of the employees acknowledged having signed for the union." (GC Exh. 19.) Bardic confirmed at the hearing, after failing to recall much of what occurred at the meetings, that the information contained in his affidavit was correct. (Tr. 295-96.)

[9] Tr. 598, 600, 610-611.

[10] The remaining quotations in this paragraph are found at Tr. 314-315.

[11] All facts found here are based on the record as a whole and on my observation of the witnesses. The credibility resolutions have been made from a review of the entire testimonial record and exhibits with due regard for logic and probability, the demeanor of the witnesses, and the teaching of *NLRB v. Walton Mfg. Co*., 369 U.S. 404 (1962). As to those witnesses testifying in contradiction of the findings, their testimony has been discredited, either as having been in conflict with the testimony of reliable witnesses or because it was incredible and unworthy of belief or as more fully explained in the text. With respect to the testimony regarding what occurred at the meetings called by management, I have also taken into account the economic dependence of employees on employers, with awareness of an employee's attentiveness to intended implications of his employer's statements which might be more readily dismissed by a disinterested party. *See NLRB v. Gissel Packing Co*., 395 U.S. 575, 617 (1969).

that the union's organizing effort was a matter of substantial concern to the Respondent, contrary to Farrell's testimony. With respect to Sharpe's testimony, to claim that the meetings were held because of unidentified rumor and gossip about "nothing in particular"[12] demeans Farrell's responsibilities and her position as the human resource manager and is belied by the timing and method of the meetings.[13] Moreover, Sharpe's testimony is contradicted by Metz' admission that Metz was aware of the Union's organizing campaign and by Farrell's admission that she was requested by Metz and Sharpe to schedule the meeting because of the union activity.

Farrell further testified that the only question she asked Mauer in her individual meeting with him, and the only matter she was concerned about, was whether he knew of any union member coming into the Building and talking to the maintenance employees when they were working. According to Farrell, Mauer replied that he knew nothing. She asserts that nothing else was stated in that meeting. Sharpe, on the other hand, added that Farrell discussed with Mauer the union authorization cards that were going around, that if he had any questions regarding the Union he was free to contact Farrell, and that he could talk to the Union at any time "as long as it wasn't on company time." By "company time," Sharpe testified that she meant all time that the employees are punched in on a timeclock, including breaktime and lunchtime.

It is not credible that Farrell would have scheduled individual meetings with every maintenance employee at the Building so that she could ask each of them the single question of whether they knew of any union member coming into the building and talking to an employee who was working. Surely, this is a question that she could just as easily have asked in the general meeting with the maintenance staff, at least if that were the only question she was going to ask. Rather, as Mauer testified, Farrell also asked whether he had talked to the Union, whether he had signed an authorization card, whether any other employee had signed an authorization card, and, in general, what he thought of unions. Moreover, these are the very type of questions (i.e., questions tending to prove violations of the Act) that, if they were going to be asked at all, would more likely be asked in individual meetings without the presence of other witnesses. In addition, individual meetings would tend to be a more effective way to determine the employees who supported the Union versus the employees who did not. Indeed, neither Farrell nor the Respondent provided any explanation for why she felt it necessary to have individual meetings with every maintenance worker, as well as a general meeting with all of the

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[12] Sharpe also testified that the rumors and gossip had been "on-going," Tr. 600-601, further undermining any credibility in her testimony, because the timing of the meetings, within days of the Union's organizing presence at the Building, is too coincidental for one to accept that Farrell came to the Building to address some previous and on-going "rumors" about anything other than the Union's organizing campaign. Moreover, Farrell contradicts Sharpe's testimony in this regard since Farrell admits that Sharpe had called her about the Union having been at the Building and having talked to the maintenance technicians. Without regard to the legality of what occurred in the meetings and the manner in which they were conducted, Sharpe's evasiveness and persistent failure and refusal to acknowledge why the meetings were held (see, e.g., Tr. 598-601, 610-611) adversely affects her credibility as a witness.

[13] My conclusion here is also supported by the only other instance in which Farrell was called upon to address "gossip" amongst the maintenance staff. This occurred after Mauer had been fired, and he came back to the Building with union staff the next day. As a result, there was much "gossip," and Farrell, as well as Cindy Biogetti, came to the Building to meet with the maintenance staff. (Tr. 406-409.) Accordingly, and in spite of Sharpe's denials (see, e.g., Tr. 610-611), "gossip" appears to be Respondent's shorthand for talk amongst the staff of union matters.

same workers; much less, schedule and conduct individual meetings with all maintenance staff in order to ask this one question.

Accordingly, I credit the testimony of Farrell that the individual and general meetings on March 27 were held because of the union activity the previous week. I also credit the testimony of Mauer,[14] and find that in the individual meeting with Mauer, Farrell questioned him about whether he had signed a union authorization card, whether other maintenance workers had signed authorization cards, and what he thought about the Union. I further credit Sharpe's testimony that Farrell told Mauer he could talk to the Union at any time "as long as it wasn't on company time."

In describing what occurred in the general meeting with the maintenance workers, Farrell testified that she told the group she did not know what would happen to the Respondent if the Union were to come in, that she hoped they were happy with the Respondent, and she hoped they would feel that they did not want the Union. She testified that she told the maintenance workers that the decision regarding unionization rested with them. Farrell testified that none of the workers said anything after she gave her speech—"they were very quiet."[15]

In resolving the question as to what occurred in the individual meetings and at the general meeting, I have also relied on the mannerisms and demeanor of the witnesses. By tone of voice, eye contact, and overall demeanor, the Respondent's managers demonstrated hostility to the Union. Sharpe, in particular, displayed an aversion or hostility to the Union that was palpable.

I accept Farrell's recitation of matters she claims to have told the maintenance workers in the general meeting. However, I also accept Mauer's testimony, supported by the statements of Bardic, regarding Farrell's additional statements and questions at the meeting. I also accept Sharpe's testimony that Farrell told the maintenance staff that they could not talk to the Union on company time. To the extent, if at all, that Mauer's testimony may conflict with the testimony of Farrell or Sharpe regarding what was said at the general meeting, I accept the testimony of Mauer. For the same reasons that I have credited Mauer's recollection of what occurred in the individual meeting, I also credit his recollection of what occurred at the general meeting.

On April 8, Sharon Sharpe and Cheryl Metz, on behalf of management, called a meeting for the maintenance staff at the Building. There were approximately six maintenance mechanics and two management persons at the meeting. During the meeting, Metz reiterated the Respondent's position on unions. She stated that unions were not wanted and were not liked, there was no need for unions, and they would not be allowed back into the Building. Metz stated

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[14] In crediting the testimony of Mauer, I have not relied and do not rely on Mauer's affidavit for the truth of the matters asserted therein. (R Exh. 30.) Respondent's counsel used portions of the affidavit to cross-examine Mauer. During the hearing, the General Counsel sought to have the affidavit admitted for the truth of the matters set forth in the affidavit. At the conclusion of the hearing, I invited counsel to address in their respective Briefs whether the affidavit could be considered for this purpose. Neither General Counsel nor the Union addressed the question in their briefs. The Respondent did address the question, arguing that the affidavit should not be considered for the truth of any matter contained therein. I conclude that the General Counsel has abandoned its claim that the affidavit should be considered for the truth of the matters asserted therein, and I grant Respondent's request that Mauer's affidavit only be considered for impeachment purposes.

[15] Tr. 319.

that unions are no good, and that a union would do nothing for the workers except take their money. She then gave an example of a former employee who was a member of the Union. This employee was fired, but Metz claimed that the Union did nothing to help him. She stated that the Union would just take the workers' money without doing anything in return. Metz also said that if the Union came in, the Building would be considered overstaffed according to union rules. Therefore, management would have to determine which maintenance staff to keep and which employees would no longer work in the Building. She said that the Respondent would keep one engineer and two maintenance mechanics, and the rest of the work would be contracted out.[16]

Metz described her comments to the employees about the consequences of a union in more general terms. She said that she told the employees:

> A lot of the reasons that we're there is because we need to better service the resident. And I have mentioned to them [i.e., the maintenance staff] that in the beginning everything was contracted [out] . . . . I went to the company and I felt that I could improve on our productivity and I could improve on our service to the residents if I could have my own team. If I could have more staff. And they [the company] listened to me. I increased the payroll almost four times. So I sort of let them [the maintenance staff] know that, you know, I sort of, it was me that went to bat to put this whole team together and to build on a team instead of contracting things out. And this wasn't going to look very good for me.[17]

This description is not necessarily inconsistent with the statements attributed to Metz by Mauer. Accordingly, I credit Mauer's and Metz' recollection of statements made by Metz at the April 8, 2002 meeting.

B. Discharge of Gregory Mauer

1. Events prior to March 28, 2002

In approximately mid-October 2000, Mauer applied for a maintenance position with the Respondent. He interviewed with General Manager Cindy Biogetti. During the interview, Mauer explained to Biogetti, after she had reviewed his resume, that he had received all his schooling from a union and that his experience was exclusively in union buildings. Mauer's resume also disclosed that he had received his schooling and qualifications for the job from a union. Biogetti then advised Mauer that the Respondent was "not a union company." He replied, "That's fine."[18] Biogetti did not recall what was said during her interview of Mauer, but she does not recall ever asking a prospective employee about his or her union affiliation. Nevertheless, she did not deny making the statement attributed to her by Mauer. The testimony of Mauer and of Biogetti is not necessarily inconsistent. Accordingly, I accept Biogetti's statement that she does not remember ever asking prospective employees about their union affiliation (Mauer does not claim that Biogetti asked him about his union affiliation), and I also accept Mauer's specific recollection that during his interview with Biogetti he told her that he had received his schooling and qualifications for the job from a union,[19] and that Biogetti responded by stating the Respondent

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[16] This description of the April 8 meeting is taken primarily from the testimony of Mauer. However, Sharpe also testified that Metz talked about previous subcontracting of maintenance work, which resulted in the Building having only two maintenance staff. Tr. 604.

[17] Tr. 404-405.

[18] Tr. 94.

[19] The Respondent argues that Mauer's testimony that he acknowledged receiving his

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was "not a union company."

On approximately October 15, 2000, Gregory Mauer was hired as a maintenance technician at the Building. About 1 month after Mauer started working, management provided him with the Respondent's employee handbook, which sets forth the Respondent's rules, regulations and policies regarding employees. Human Resource Manager Farrell has used the handbook since she started with the Respondent in 2000. She uses the handbook as a guide, and she uses it in a variety of circumstances including misconduct, productivity problems, absenteeism, and in discharge situations.

Mauer successfully completed his 90-day probationary period with the Respondent, which is a procedure set out in the employee handbook. After his first full year of employment, Mauer's job performance was evaluated. Cheryl Metz evaluated Mauer's job performance in October 2001, a procedure that is also set out in the employee handbook, and she judged his performance to be satisfactory. The acceptability of Gregory Mauer's job performance as of October 2001, at least insofar as his expected continued employment with the Respondent is concerned, is further shown by Metz' comments on his job evaluation that she expected to see a "4 next time" in the evaluation of Mauer's "overall hands on skills."[20]

In approximately October 2001, Sharpe assigned Mauer to perform "preoccupancy" work. Preoccupancy work is work that is performed in vacated apartments in order to fix any problems and prepare the apartment for another rental. Before October 2001, the preoccupancy work was performed by several different mechanics. However, in approximately October 2001, Mauer was summoned by Sharpe who told him that she liked the way he did the preoccupancy work, she liked the way the apartments looked after he completed his work, and that he had a great eye for detail.[21] Accordingly, Sharpe appointed Mauer to do all the preoccupancy inspections and work in the Building. Although Sharpe and Metz testified that Sharpe appointed Mauer as the sole mechanic to do preoccupancy work as a result of complaints Sharpe had received from other residents about how he left their apartments after performing repairs,[22] this testimony is not credible.

Preoccupancy work comprises much of the Respondent's business. "It's our first impression with the customer and it's maintaining the asset."[23] Preoccupancy work even implicated the Respondent's compliance with the code provisions of the City of Chicago. It is not credible that the Respondent would assign Mauer as the only mechanic to perform such singularly important work in reaction to complaints about his performance. Indeed, just the opposite is more likely. If the Respondent had received complaints about Mauer's work, such as his work was messy or he was unable to do the work, he would not be assigned to do work in

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schooling for the job from the union, and that Biogetti responded by saying that the Respondent was not a union company, is not credible. The Respondent also argues, in reference to later testimony by Mauer concerning what occurred during his discussion with union organizers in the lobby of the Building on March 21, 2002, that Mauer had no reason to believe that he would get into trouble if management saw him talking about union matters, and therefore that the contrary testimony by Mauer is also incredible. (Respondent's Posthearing Br., pp. 14-15.) However, if one accepts that the former occurred, as I do, then the latter is both more likely and more credible.

[20] GC Exhibit 12, p. 6; Tr. 114-115.

[21] Tr. 118.

[22] Tr. 595.

[23] Tr. 444.

apartments for new tenants, but rather would be assigned to do work in other apartments where a "first impression" was not so crucial. Or, he may have been warned, counseled, or disciplined if his work had been poor or if complaints had been received, but there is no evidence of any such warning, counseling, or discipline prior to his being assigned to do preoccupancy work. In short, if there had been complaints about or concern about Mauer's work, it is reasonable to believe, first, that there would be some documentation of such performance problems, and second, that Mauer would have been assigned to perform less important work rather than the more important work he was actually assigned.

In addition, when Sharpe was asked if she had told Mauer that she liked the way he did preoccupancy work, she responded that "I don't recall that, no,"[24] leaving open, at least, the possibility that she did tell this to Mauer. I am inclined under all of these circumstances to accept the specific recollection of a witness (Mauer) concerning the occurrence of an event over the testimony of another witness (Sharpe) who does not recall, but does not deny, the same event. Accordingly, and for all of the above reasons, I accept Mauer's testimony that when he was summoned by Sharpe, she assigned preoccupancy work to him after telling him that she liked the way he did this work, she liked the way the apartments looked after he completed his work, and that he had a great eye for detail.

On February 28, Mauer received, for the first and only time during his employment with the Respondent, an employee warning notice relating to his work performance.[25] The notice cited five apartments in which Mauer had allegedly failed to perform proper work, and stated that the time frame of Mauer's poor work was February 5 through 20. The notice does not give any description of the alleged complaints or the alleged performance problems other than in one instance.

The Respondent produced documents that it claims support the employee warning notice given to Mauer. However, none of these allegedly supporting documents were attached to the warning notice that the Respondent maintained in its files. Instead, the allegedly supporting and pertinent documents were obtained by and reconstructed by the Respondent in preparation for the hearing in this case. Also, the Respondent did not produce any witness who had direct knowledge of the work performed by Mauer in these instances.[26]

The residences at which Mauer allegedly did the poor work cited in the warning notice were 10T, 3E, 6E, 17J, and 7B. The documents offered by the Respondent to support the reference to apartments 10T, 3E, 17J, all refer to work that was done outside the timeframe listed in the warning notice.[27] The Respondent offered no documents to support the reference to apartment 7B. Accordingly, I find that of the five instances cited in the warning notice, the evidence supports only one such instance of allegedly poor performance by Mauer.

Moreover, the Respondent employs a preoccupancy inspector, a person who inspects the apartments before a new resident moves into an apartment. This person is John Mockridge, who is the service coordinator. One of Mockridge's duties is to inspect the apartments after the

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[24] Tr. 595.

[25] GC Exh. 13; R Exh. 32; Tr. 123-128. Because GC Exh. 13 is the same document as R. Exh. 32, I will hereafter refer only to GC Exh. 13.

[26] The work tickets that were offered into evidence by the Respondent were all documents that Metz had instructed another employee, Bill Brown, to gather after the charges in the present case had been filed.

[27] See R. Exhs. 5, 6, 7.

preoccupancy maintenance is done to make sure that the work was properly done and the apartment is ready for occupancy.[28] In addition, Sharon Sharpe also inspects apartments after preoccupancy maintenance work is done. The lack of any evidence from Mockridge, who was not called as a witness, or Sharpe, that Mauer's preoccupancy work in the matters listed in the warning notice was defective casts additional doubt on the Respondent's claim that Mauer performed his job poorly.

On March 19, Gregory Mauer received an employee warning notice relating to absenteeism. This was the first and only written warning given to Mauer concerning absenteeism. The notice stated that Mauer had been absent 12 days over the last fiscal year.[29] The notice does not state that any of these missed days were unexcused. Rather, the notice reflects that these absences were sick days. Mauer told Metz, who handed him the warning notice, that he had been sick all of those days, and she replied that she believed him. Metz told Mauer that Farrell had asked her to take this action, and that if Mauer called in sick for the next 6 to 8 months there would be disciplinary action. There is no evidence that Mauer was absent from work after March 19, except for March 29. However, as I have found herein and as the Respondent has admitted in its Position Statement,[30] this absence was approved.

The first time that Metz ever talked to Farrell about performance was in February or March 2002. Farrell's immediate response to this report was to tell Metz to find out what was wrong and to determine if the problem could be rectified. There is no evidence that Metz ever attempted to make these determinations.

Mauer received no other warning notices other than the two previously described notices, one for performance and one for absenteeism, during his time of employment with the Respondent.

2. Events on and after March 28, 2002

On March 28, Mauer was working on-call. At approximately 6 p.m., he received a call from the front desk concerning the resident in apartment 6M who had complained about a water leak in her bedroom. Mauer responded, and after a preliminary investigation, determined that the leak was originating from the resident's bathroom area.

Mauer tried to find the valve to shut the water off to that apartment, but was unable to locate the valve.[31] He telephoned Lead Mechanic Barajas, several times to try to locate the valve and to obtain assistance. Barajas first responded, "Why are you calling me? You're the one that's on call."[32] Later, Barajas told Mauer to call Bardic, who might know where the valves

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[28] Tr. 119-121, 221.

[29] Tr. 130; GC Exhibit 14.

[30] GC Exh. 2, p. 5.

[31] There are pipes and valves throughout the entire area of the basement. Most of the valves are not marked nor is there a chart designating the locations of the pipes controlled by such valves, with the result that the apartment number or other location of the water pipe to which the valve is attached is not readily or easily known.

[32] Tr. 151. Barajas testified that he told Mauer in this telephone conversation that the shutoff valves for the M tier were located either on the 21st or 22nd floor. (Tr. 572.) This testimony is not credible, in spite of Barajas' admitted ignorance of the exact location of the shutoff valves for the M tier. Barajas admits that Mauer called him a couple hours after the first telephone call and said that he would have to shut off the main water. (Tr. 573.) Barajas' response to this was "if he

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were located, and to call Matica, Mauer's backup, and tell him to come to the Building.

Finally, Mauer telephoned Art Barajas to obtain his approval for shutting off the hot water in the entire building. Barajas approved this action, but cautioned Mauer to obtain Sharon Sharpe's approval before shutting off the hot water, and to shut off the pump for the hot water because if the pump were to run dry, it would cause the seals to leak and require the replacement of the pump. Mauer telephoned Sharpe who approved shutting off the hot water. Mauer then shut off the water and proceeded to drain the water that remained in the pipes. However, he did not shut off the pump.[33] At about this point, Matica showed up, and Matica and Mauer put a valve on the broken pipe to stop the leak.

After the hot water was shut off and the leak was stopped, Mauer telephoned Sharon Sharpe to advise her of the situation and to tell her that the resident in 6M would be unable to use the bathroom in that apartment until it was cleaned and fixed. Sharpe advised that the resident could use one of the corporate suites in the Building. Mauer advised the resident of this, but the resident declined.

Mauer and Matica cleaned the areas of the Building that had been damaged by the leak. These areas included apartment 6M, where holes had been cut in the bathroom and hallway walls in order to obtain access to the leaking pipe, and an area on the ground floor where the leak had caused the ceiling to collapse. However, the cleaning was by no means complete. Moreover, water continued to drip from the ceiling on the ground floor further exacerbating the mess caused by the leak. Mauer and Matica quit cleaning at approximately 6:30 a.m. on March 29. They did not report to work the next day because of the virtually continuous work, for Mauer, but less for Matica, that they had done over the previous 18 hours. Mauer telephoned Art Barajas at about 8 a.m., explained what had occurred since they last spoke, and asked Barajas if it was alright if he did not come into work. Barajas said, "That's fine."

The next day, March 29, Fred Gist, a maintenance mechanic, was assigned to fix the leak in apartment 6M. Gist spent several hours at this and other jobs. However, he did not fix the leak nor was he disciplined for failing to repair the leak.[34] On March 30, Bardic was also assigned to fix the leak in apartment 6M.[35] He failed to fix the leak, but he was not disciplined for failing to fix it. Metz explained that these mechanics were not disciplined because they were simply trying to repair leaks that had been caused by Mauer. But this reason hardly justifies differential treatment if the treatment is supposedly based on the failure to fix a leak. Moreover,

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had to, he had to, but he had to make sure that the hot water tanks were off and the pumps were off." It is simply not credible that the lead mechanic would authorize the shut off of hot water in the entire building if he had already instructed Mauer as to the location, even the general location, of the shutoff valve for the particular tier. At a minimum, Barajas would have asked Mauer why he did not shut off the M tier, and why he did not do what Barajas claims to have told Mauer in the first conversation. I find the reason for this incongruity is that Barajas did not tell Mauer or discuss with Mauer what Barajas claims.

[33] Because Mauer failed to shut off the pump before shutting off the water, the pump was damaged and the Respondent was required to purchase a new pump, which was installed on April 11, 2002. Metz testified that she signed the purchase order for a new pump, and that the cost of the pump was approximately $1800. (Tr. 501.) However, the Respondent, in its Position Statement, asserted that the cost of the new pump was $1076.98. (GC Exh. 2, p. 6.) I accept the more precise, latter figure.

[34] GC Exh. 31; Tr. 534.

[35] GC Exh. 20.

it is simply not true that Mauer had caused the leak. Mauer, Gist and Bardic were each faced with the task of trying to fix a leak. None of them succeeded. None of the Respondent's maintenance mechanics, other than Mauer, received any discipline regarding their failure to fix the leak in apartment 6M over a 2-week period. Mauer was fired, allegedly for his failure to fix the leak over the course of one hectic evening. The disparate treatment, if indeed the failure to fix the leak was the basis for the Respondent's firing of Mauer, is striking.

It was not until April 11, approximately 2 weeks after the leak occurred, that Lead Mechanic Barajas, together with the help of the lead mechanic from another of Respondent's properties, repaired the pipe in apartment 6M. No one from management ever spoke to Mauer about his performance in dealing with the leak on March 28 or about his failing to report for his regular shift on March 29.

On April 8, Sharon Sharpe and Cheryl Metz called a meeting for the entire staff at the Building. This meeting is described above. After the April 8 meeting and after the maintenance staff had returned to their work, Metz came down to the basement to talk with Gregory Mauer. She appeared to be agitated. She said to Mauer, "I want you to look at me and swear to me that you did not give personal information about my employees to that skunk Union."[36] Mauer denied doing so, and told her that he did not even have access to that information. Not content, Metz asked him the same question again, and again Mauer denied doing so. Five minutes later, while she was standing outside another person's office, Metz again asked Mauer the same question, and he again denied her accusation.[37]

Metz denies using the language attributed to her by Mauer. However, she testified that she was very concerned about the Union telephoning her employees at home. She even suggested to at least one employee to call the police if the employee were "frightened or worried"[38] about a telephone call from the Union. Notwithstanding this testimony, the Respondent now claims that "[t]here is no evidence that Metz was concerned or had any knowledge that anyone was giving such information to the Union." (Respondent's Posthearing Br., p. 16). In light of Mauer's and Metz' testimony, this contention is rejected.

On April 12, Metz prepared a memorandum to Nancy Farrell in which she recommended that Mauer be terminated "with expediency."[39] Metz' memorandum states that work tickets relating to the March 28 events were attached to the memorandum; however, no such work tickets were attached to the memorandum at the time of the hearing, and Farrell did not know where these work tickets were or what particular matters they described. Metz stated that the work tickets related to the March 28 events, but she also did not know where the tickets were.

In Metz' memorandum, she identifies the two mechanics that had dealt with and responded to the March 28 leak—Mauer and Matica. She recommended Mauer's discharge. However, she only recommended a "warning notice" for Matica. She explained in the memorandum that this disparate treatment was due to Matica's minimum time working in the

[36] Tr. 177.

[37] I do not decide, and am not called upon to decide, whether or not Mauer gave "personal" information relating to coworkers, such as home addresses, to the Union. Nor am I called upon to decide, if Mauer had done so, whether such action would otherwise be proper or whether it would constitute protected activity. The statement and actions of Metz are noted because of their bearing on her attitude about the Union.

[38] Tr. 399.

[39] R Exh. 19.

Building. Nevertheless, and in spite of Metz' recommendation, there is no evidence in Matica's personnel file that a warning was ever issued to him.

On April 15, the next business day after Metz wrote her memorandum, Mauer reported for work at approximately 9 a.m. At about 2 p.m., Cheryl Metz called him on the radio and asked him to come to the conference room. When he arrived, Cheryl Metz and Nancy Farrell were in the conference room. They told him that he was being terminated. He asked why. They told him that it was because of his absenteeism and his job performance. They gave no other reason or explanation. Mauer gave them his keys and radio. He was accompanied upstairs for his personal tools, which he put into his locker so that he could retrieve them another day. He was accompanied to his locker for his shoes and coat, and he left.

Nancy Farrell testified that she did not give Mauer a reason why he was being terminated, and he did not ask. She claims that she simply and directly told Mauer that he was no longer working for the Respondent, and Mauer said nothing. However, Metz testified that Mauer did ask why, and that Farrell responded that it was based on performance and absenteeism. The unlikelihood of Farrell's extraordinary scenario is striking. For a person, any person, who has worked for an employer for over 18 months, to be suddenly told that he is being terminated, but to ask no questions, such as "why?" is, to say the least, an unusual and unlikely proposition. I find that Mauer's and Metz' testimony is credible, while Farrell's is not, and that Mauer did ask and Farrell told him that the reason he was being fired was because of his absenteeism and job performance.

Although Farrell, with Metz, told Mauer on April 15 that he was being terminated because of absenteeism and job performance, Farrell testified at the hearing that the reason he was fired was only because of job performance. The only example of alleged poor performance she identified were the events of March 28. She also added, "just general performance of some of his job duties that had been occurring in the months previous to that."[40] At the hearing, Farrell did not know how many warnings Mauer had received concerning his performance, although she testified that at the time he was fired she did know.

Farrell testified that prior to March, Metz had talked to her about terminating Mauer. There is no documentation in Mauer's personnel file, or in any other file, that Metz or Farrell wanted to terminate Mauer before March. If Metz, the manager of the Building, wanted to fire Mauer, and if she told her intention to Farrell, surely Farrell would have taken some action, and just as surely there would have been some documentation in the file to reflect either the intent to fire Mauer or the justification for such firing. There is none.

Farrell testified that after Metz told her that Metz wanted to fire Mauer she told Metz to document the file. Farrell stated that this instruction explains the single warning notice, dated February 28, 2002, that Mauer received concerning his performance.[41] However, there is no documentation in the file to explain or justify Metz' alleged intent to fire Mauer before that warning notice, in spite of Farrell's statement that Metz had already formed this intent prior to Mauer having received any warning notice concerning his performance. Moreover, Farrell's statement that Metz sought her authorization to fire Mauer conflicts with Metz' testimony that Metz had the authority to hire and fire.

Metz testified that the first time she had knowledge that Mauer had any association with

[40] Tr. 309.

[41] Tr. 364; GC Exh. 13.

the Union was the day after he was terminated. In view of Farrell's testimony that it was Farrell's decision to fire Mauer, it may not be necessary that I resolve the question of Metz' credibility regarding her statement of lack of knowledge. Nevertheless, considering Metz' involvement in Mauer's firing, the fact that she recommended that Mauer be fired "with expediency," and Metz' own testimony that the discharge of Mauer was her decision,[42] I will address the question of Metz' credibility concerning what she knew.

I find that Metz is not credible when she stated that she did not discover that Mauer was associated with the Union until after he had been fired. I make this finding based on all the evidence in this case, including, in particular, (1) the demeanor of the witnesses, (2) Mauer's disclosure of his union affiliation to Cindy Biogetti when he interviewed for the maintenance technician position, see infra, (3) Mauer's continual attempts to sign up coworkers after the Union's March 21 appearance at the Building, (4) Sharon Sharpe's observation of Mauer with the union organizers on March 21, (5) the fact that Biogetti is the sister of Metz and Sharpe is the daughter of Metz, (6) the interrogations of Mauer on March 27 (by Farrell), and on April 8 (by Metz), (7) the small number of maintenance technicians, approximately 6, who work at the Building, (8) the overriding concern of Metz and the Respondent's management about the union's organizing efforts, (9) my previous and subsequent findings regarding various aspects of Metz' testimony that lack credibility, and (10) the disparate manner in which Mauer was treated in Metz' and Farrell's decision to terminate his employment. No one of these factors is determinative and the absence of any factor would not change my finding.

Metz testified to the reasons that she fired Mauer. She said that Mauer went from average to poor to "downright destructive." She also said that Mauer had been given every chance, but that his absenteeism and incomplete job tickets were regular. "The simplest of things, such as putting a screen in a window, that's a simple thing. I can put a screen together and put it in your window."[43] These statements are deceptively not true—deceptive because they have a modicum of truth that conceals their essential and overall fallacy. Moreover, neither absenteeism nor incomplete job tickets were mentioned in Metz' April 12 memorandum to Nancy Farrell in which Metz set forth the reasons, at that time, for her recommendation that Mauer be terminated "with expediency."

Mauer had received a single warning notice concerning his job performance and a single notice concerning his absenteeism prior to being fired. These warnings were issued before the Union came to the Building on March 21. Mauer did not receive any warnings concerning job performance or anything else after the Union appeared on March 21. Even if the two prior warnings were accepted as justified, the reasons given by Metz would still constitute but a modicum of truth. Mauer, in fact, had not been given every chance. There is no evidence that incomplete work tickets by Mauer were a regular occurrence. And, Mauer's absenteeism, even if it could be considered to be "regular," was still less than another employee who was not connected with the union and who was not fired in spite of that employee's substantially greater absenteeism.[44] And Metz' disingenuous statement that she can make a screen and put it in a window is irrelevant to whether Mauer could or should have known how to make a frame for a

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[42] Tr. 413. Metz was inconsistent on the question of her authority to fire Mauer, saying at one point that she had "the authority to terminate people unilaterally at 1400 Lake Shore Drive" (Tr. 503), and later saying that she only made recommendations on firing someone, and that the final approval came from Nancy Farrell. (Tr. 505.)

[43] Tr. 414.

[44] See infra regarding James Campbell.

screen to be placed in the window of the resident's apartment.[45] Indeed, when Mauer advised his lead technician of this problem, the lead technician's "answer" was wait until spring. There is no evidence that any of Respondent's maintenance technicians knew how to make a frame for a screen.

Respondent, as well as the General Counsel, offered examples of other employees who were terminated. I have considered these examples or comparables for their bearing, if any, on whether the Respondent unlawfully discriminated against Mauer when it fired him, and, if so, whether the Respondent would have taken the same action in the absence of such motivation. *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983); *Sonoma Mission Inn & Spa*, 322 NLRB 898, 905 (1997) (treatment of similarly situated employees who were not involved in protected activity is relevant in determining motive).

Respondent offered as an example Billy Holloway, a maintenance technician, who was terminated on April 6, 2001.[46] The only explanation for Holloway's termination on the Respondent's termination form is "not working when asked and not calling in (3-18-01). Insubordination to a superior—Low performance of duties." Holloway's personnel file also reflects several instances of improper job performance, insubordination, and unauthorized absences.[47] Holloway's personnel file also contains documentation of a meeting he had with Nancy Farrell regarding the proper procedure for using his time card. This procedure is set forth in the Respondent's employee handbook. Farrell stated that she had similar meetings with all hourly employees. On the other hand, Farrell did not meet with Gregory Mauer before firing him to explain any problems in his performance or attendance.

The second example offered by Respondent is Joseph Meyer. The only document pertaining to Joseph Meyer is an employee discipline form, which reflects that he was warned, not terminated, concerning his failure to complete work for "move-ins," i.e., preoccupancy work. There is no date for this warning. The third alleged comparable is Daryl Carpenter. Carpenter worked at the front desk. He was fired on July 12, 2000 for absenteeism. The reason given is that the "employee [was] scheduled for 1 AM—9 AM shift on 7/11—never showed-never called. This is the 2nd offense." The fourth example is Janette Long, from the leasing department, who was fired on October 19, 2000. The reason given was that she "was verbally warned yesterday not to be late anymore. She didn't come in today until 9:30." "Cheryl Sharpe" signed this termination form, and favorably recommended the rehiring of Janette Long. The fifth and last alleged "comparable" is Darrell Thomas, a carpenter. He was fired on July 17, 2001. No reason is given for this termination, and Farrell did not know about or remember this individual, as she did not know about or remember any of the other firings. None of these examples are sufficiently comparable to the facts in the present case as to be helpful in evaluating the consistency or propriety of the Respondent's action in discharging Mauer.

The General Counsel also offered evidence of the Respondent's treatment of other employees. Matica's personnel file shows that in 1999 (before the Respondent assumed control

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[45] The maintenance shop did not have frames to fit the window in the job that had been assigned to Mauer. (Tr. 125.) Metz did not mention this fact when she made her statement that she was able to put a screen in a window.

[46] R. Exh. 22A. The following disciplinary examples are contained in succeeding letter exhibits, for example R. Exhs. 22B, 22C, etc.

[47] GC Exh. 21.

of the Building) his work performance was poor.[48] Later, on October 29, 2001, Matica was suspended for 3 days after he left work without permission. In imposing this discipline, the Respondent specifically cited the provisions in the employee handbook relating to the policy on sick leaves and personal days, and disciplinary offenses.[49] The file also shows that in February 2002, Matica had refused to do work that the property manager at the 1936 N. Clark property had assigned to him. He was, as Farrell acknowledged, insubordinate, and immediate termination would have been justified and would have been consistent with the employee handbook.[50] He was told to leave by the property manager, and he subsequently claimed that he had been fired. However, Farrell treated it as a resignation, and further advised Matica that if he desired to continue working for the Respondent, he would be allowed and that he should report to Sharon Sharpe at 1400 North Lake Shore Drive on February 27, 2002.

Matica was Mauer's backup mechanic on March 28. He had been a mechanic at the Building for a period of 1 month before the events of March 28. Also, he had been the lead technician in his previous building. Matica, of course, had a history of insubordination immediately prior to starting work at 1400 Lake Shore Drive. Matica arrived in the evening of March 28 at about the time when Mauer had shut off the hot water in the building. He and Mauer then worked together in containing the damage and cleaning up the mess that had been made by the leak and the containment of the leak.

The personnel file of Henry McJunkins, an electrician at the Building, shows that on different occasions he had been insubordinate, he failed to complete his work assignments, he had acted rudely and improperly to staff, he swore at his supervisor, he had not been working full 8-hour days, and his work was substandard.[51] As a result of these infractions and this poor performance, Farrell and the lead technician held a meeting with McJunkins on June 20, 2001 in which they discussed and tried to work through these issues. This discussion was consistent with the policies and procedures in the employee handbook for employees whose performance is poor.[52] McJunkins was not terminated, but rather was given a 14-day probationary period. This probationary period is also consistent with the policies and procedures of the employee handbook for employees who are having performance problems.

Farrell explained the difference in the way the Respondent treated McJunkins, as opposed to Mauer, by stating that McJunkins' infractions included insubordination, i.e., deliberate misconduct, whereas Mauer's problems were solely performance. She explained that, in her opinion, deliberate misconduct and attitude problems can be more easily handled and rectified by working with the employee and instructing the employee, as distinguished from an employee's (alleged) inability to perform the job for which, again in her opinion, the employee cannot be instructed. Farrell was not a credible witness and this explanation is simply another example of her lack of credibility. First, the explanation fails to account for the fact that McJunkins' infractions included performance, as well as misconduct and attitude problems. To add insubordination and attitude problems to his already existing performance infractions would reasonably and normally tend to exacerbate the need for and propriety of discipline. But Farrell apparently believes just the opposite. If one were to accept her testimony, a poorly performing employee increases his chances of remaining on the job and of not being fired if he were also to engage in insubordination or other deliberate misconduct. Second, her testimony is contrary to

[48] GC Exh. 25.
[49] GC Exh. 11, pp. 7 and 26,
[50] Tr. 330.
[51] GC Exh. 22.
[52] GC Exh. 11, p. 20,

the provisions of the Respondent's employee handbook, which specifically directs and provides for ways in which an employee's performance can be addressed and improved. The Respondent's employee handbook recognizes that poor performance problems can and should be addressed, and it lists some of the ways in which poor performance can be addressed. Indeed, the employee handbook recognizes that performance issues, above all and certainly above misconduct issues, should be addressed with the employee.[53]

This handbook, which Farrell acknowledges following in matters involving employees other than Mauer, provides that a poorly performing employee should be made aware of the problem, suggestions should be put in writing as to how the problems can be eliminated, and the employee should be given sufficient time and help in which to remedy the problem. These procedures were not followed in the Respondent's treatment of Mauer, but they were followed, as Farrell acknowledges, in the Respondent's treatment of McJunkins. The handbook also provides that

> In keeping with the company's concern for all employees, termination of employment on the initiative of the company under circumstances generally related to the quality of the employee's job performance deserves special consideration. The company would like to insure that every reasonable step has been taken to help the employee continue in productive capacity.[54]

This written policy is contrary to the stated policy of Nancy Farrell, the human resource manager and the person charged with implementing and enforcing the Respondent's personnel policies.

Farrell's alleged personal policy regarding the relative importance of performance and misconduct/attitude issues is further belied by the pamphlet that was issued to all maintenance staff employees in the meeting scheduled by Metz and Sharpe on April 8.[55] The pamphlet, utilizing a true-false approach, stated:

> When it comes to your maintenance staff technical skills are more important than customer service skills.
>
> FALSE. Although actually fixing the problem IS important, their ability to communicate information and gain the customer's trust is what the customer remembers.

After Farrell testified that Mauer was fired because of performance problems, she was asked to identify the provision in the employee handbook under which his discharge was made. In response, however, she identified a section of the handbook dealing with misconduct offenses, not performance problems. The "offense" she identified was the catchall phrase in the misconduct section of the Booklet, "other offenses that are in the Managers [sic] judgment seriously threaten the well being of the company, it's [sic] employees or the residents."[56] Nevertheless, Farrell had already and inconsistently testified that Mauer was fired because of performance, not misconduct. In addition, misconduct like this vague "offense" cited by Farrell, even deliberate misconduct, is something that Farrell had already stated could be handled by discussing the matter with and instructing the employee, something that neither she nor the

[53] See, e.g., GC Exh. 11, p. 20.
[54] Id.
[55] R. Exh. 23C.
[56] GC Exh. 11, p. 26.

Respondent had done or offered to Mauer.

D. Analysis

1. Section 8(a)(1)

Section 8(a)(1) of the Act provides that it shall be an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7" of the Act. Section 7 guarantees to employees the right to form, join, or assist labor organizations. A violation of Section 8(a)(1) does not depend on the employer's motivation or on the subjective reaction of the employees or on whether the coercion succeeded or failed. Rather, the Board's test is "whether the supervisor's conduct reasonably tended to interfere with the free exercise of the employee's rights under the Act." *Whirlpool Corp*., 337 NLRB No. 117 (2002), *citing American Freightways Co*., 124 NLRB 146, 147 (1959). In making this determination, all of the circumstances, including the context in which the alleged unlawful statement or action occurred, are considered. *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969).

a. *Was Sharon Sharpe a supervisor?*

Before addressing the charges of unfair labor practices set forth in the complaint, a preliminary question is the status of Sharon Sharpe who, during the relevant period, was the service manager at the Building. In this position she was responsible for overseeing the work orders and purchase orders at the Building, together with bill approval and paying. Her responsibilities also included the assignment and direction of maintenance mechanics, and the inspection of work performed pursuant to her direction.

Section 2(11) of the Act defines a "supervisor" as follows:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The functions listed in Section 2(11) are read in the disjunctive. *NLRB v. McEver Engineering,* 784 F.2d 634, 642 (5th Cir. 1986); *Amperage Electric*, 301 NLRB 5 (1991). Thus, if an employee possesses any one of the 13 kinds of authority set out in Section 2(11), she is a "supervisor" for purposes of the Act, but only if she holds her authority in the interest of the employer and the exercise of her authority requires the use of "independent judgment." *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001). If a person actually possesses the statutory authority, then she does not lose it by exercising it infrequently or even not at all. *Babcock & Wilcox Construction Co*., 288 NLRB 620 621 fn.3 (1988).

Sharon Sharpe, as the service manager for the Building, possessed the authority to transfer, assign, and responsibly to direct the maintenance mechanics at the Building. Moreover, this authority required the use of independent judgment, as is clearly shown by her assignment of Gregory Mauer to do preoccupation work. Accordingly, I find that Sharon Sharpe is a statutory "supervisor."

b. *Meeting on March 27, 2002*

(1) Preliminary question of whether to make an adverse inference against the General Counsel

With respect to my credibility determinations in deciding what occurred at the individual and group meetings, Respondent argues that an adverse inference should be drawn against the General Counsel for its failure to call other maintenance workers who were present at the meetings. *Torbitt & Castleman, Inc*., 320 NLRB 907, 910 fn.6 (1996), affd. 123 F.3d 899, 907 (6th Cir. 1997). However, the present circumstances are inappropriate for the drawing of an adverse inference against the General Counsel. As was made clear in *Torbitt & Castleman*, an adverse inference is only proper when the missing witness is available to and is expected to favor the party that failed to call him. There is no evidence in the present case that any of the other mechanics would be expected to favor the General Counsel. To take one example, the General Counsel called maintenance mechanic Bardic as a witness. Bardic was obviously hostile to the General Counsel when he was on the witness stand, and he acknowledged that he did not want to be at the hearing. The General Counsel was permitted to examine Bardic as on cross-examination. F.R.Ev. 611(c). Bardic is still employed by the Respondent and is currently receiving worker's compensation benefits for an injury he suffered on the job. *Torbitt & Castleman* supports my declination to impose an adverse inference under the present circumstances. In that case, an adverse inference was not drawn when the General Counsel failed to call a second employee who was present at the time an alleged threat of retaliation was made by the employer. The judge stated that "the absent witness was an employee, who could not reasonably be expected to favor one party over the other." 320 NLRB at 910 fn.6. Accordingly, I do not draw an adverse inference against the General Counsel under these circumstances.

(2) Interrogation of employees

The test of whether an unlawful interrogation has occurred is whether, under all the circumstances, the alleged interrogation reasonably tends to restrain, coerce, or interfere with the employees in the exercise of rights guaranteed by the Act. *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). In making this determination, all of the surrounding circumstances must be considered. Either the words themselves or the context in which they are used must suggest an element of coercion or interference. Id. Relevant circumstances include the time and place of the interrogation, the method used, the personnel involved, the nature of the information sought, the known position of the employer, whether the employee was given assurances that there would be no reprisals, whether a valid purpose for the interrogation was communicated to the employee, the truthfulness of the employee's response, and whether the person being questioned is an open union adherent. *Performance Friction Corp*., 335 NLRB 1117 (2001), citing *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964); *Rossmore House*, supra; *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985).

The individual interrogations by Nancy Farrell and Sharon Sharpe on March 27 were conducted in the Respondent's conference room, away from the employees' work place. Farrell came to the Building that day specifically to conduct the interrogations. See *Garney Morris, Inc*., 313 NLRB 101, 103 (1993) ("The participation of a high-level manager in unlawful conduct exacerbates the natural fear of employees that they would lose employment if they persisted in their union activities.") The interrogations (or as Respondent would characterize them, the meetings) were held individually with each maintenance mechanic, and, when these private interrogations were concluded, a meeting was held with the entire maintenance staff. The individual meetings were held with each individual maintenance mechanic and two management persons. In consideration of the coercive circumstances in the interrogation of Mauer, Farrell's

question to Mauer as to what he thought of unions also constitutes a violation of the Act. *Rossmore House*, supra; *Paceco,* 237 NLRB 399, 400 (1978).

In the group meeting, Farrell asked the employees questions only after she advised the employees of the antiunion position of the owner. Neither Farrell nor Sharpe gave assurances of no reprisals in the individual or group meetings, and neither Farrell nor Sharpe explained the purpose for their interrogations. When Farrell asked Mauer if he had signed a union authorization card, he falsely denied doing so, just as Bardic falsely denied signing a union card in his individual meeting with Farrell. When Farrell asked the staff in the general meeting as to who had signed union cards, no one responded, even though the evidence shows that at least Bardic and Mauer had signed such cards and Farrell had just stated that she knew that 50 percent of the workers had signed such cards.[57] This inquiry, as to who had signed authorization cards, after Farrell had just told the employees of the owner's dislike of unions and her stated knowledge that half of them had signed such cards, was clearly coercive and in violation of Section 8(a)(1) of the Act.

The Respondent produced no evidence to explain why its management conducted individual meetings as well as a general meeting. Nor has the Respondent given any legitimate business reason for inquiring into whether Mauer had been approached by the union, whether he had talked to the union, what he thought of unions, and whether Mauer, Bardic and all the other maintenance mechanics had signed union authorization cards. In addition, Mauer had tried to keep his union activity hidden, and accordingly, he was not an open union adherent.

I find that each and every factor set forth in *Performance Friction, Rossmore House* and *Bourne* supports and directs the conclusion that the interrogations conducted by Farrell on March 27 were coercive, they interfered with employees' rights under Section 7, and were in violation of section 8(a)(1) of the Act.[58] The interrogations were held during the regular workday and in offices used by management. The individual interrogations were all 2 on 1, that is, two management persons for each individual employee. The way the interrogations were conducted was also intimidating and threatening. For example, in the interrogation of Bardic, Farrell did not directly ask him if he had signed a union card, but she made it clear that he should tell her. No assurances against reprisals or explanations for the questions were given. In both the individual and the group meetings, Farrell mentioned the owner's antiunion sentiment, thus making the interrogation even more threatening. All statements and questions after Farrell disclosed the owner's antiunion sentiment would be affected by that disclosure. Mauer's and Bardic's false responses to Farrell's question regarding the signing of a union card is further evidence of the intimidating and coercive nature of the interrogations. *Rossmore House*, supra.

In addition to the foregoing factors demonstrating and supporting the coerciveness of the interrogations, an overriding factor is whether the employer has a valid purpose for obtaining the information sought. *NLRB v. Camco*, 340 F.2d 803 (5th Cir. 1965). As noted, the Respondent did not communicate its purpose to Mauer or the employees, and has failed to articulate a valid purpose during the present proceedings. Moreover, Farrell's question to Mauer concerning what

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[57] Even if Farrell's question to the employees at the general meeting, "Well, if it's not you guys, then who is it?" were treated as a rhetorical question, a contention not advanced by the Respondent, the result would be the same since such questions may be as threatening as any other type of inquiry or statement. *See K-Mart Corp*., 336 NLRB No. 37 (2001), 2001 WL 1227140, *2-3.

[58] Of course, it is not necessary that all, or indeed any, of these factors be proven before unlawful interrogation may be found. *Southwestern of Dallas Optical Co*., 153 NLRB 33 (1965).

he thought of unions, under the circumstances of this case, is inherently coercive and a violation of the Act. *Multi-Ad Services*, 331 NLRB 1226, 1227 (2000), enfd. 255 F.3d 363 (7th Cir. 2001).

Respondent contends that even if Farrell had questioned Mauer about whether he had signed a union card and whether he knew of any other employee who did the same, these questions would not constitute violations of the Act. Respondent cites *Pony Express Courier Corp*., 283 NLRB 868 (1987) for the proposition that a single question as to whether the employee has been approached by the union does not violate the Act. However, in *Pony Express*, there was only a single question, and the question involved was whether the union had approached the employee, not the question asked in the present case of whether the employee had signed a union authorization card. Moreover, the Board in *Pony Express* found that the context of the question was not such that the question could be deemed threatening or coercive. The circumstances in the present case are quite different. Indeed, in the present case, all of the relevant factors to be examined in determining whether an interrogation was unlawfully coercive are present. The Board has held, under circumstances more closely similar to the present case than *Pony Expres*s, but still involving the less threatening question of whether the employee had been approached by the union rather than whether the employee had signed a union card, that such an interrogation violated Section 8(a)(1) of the Act. *A/Z Electric,* 282 NLRB 356 (1986).

Respondent also argues that Bardic did not state that Farrell had asked in his individual meeting with her as to whether he had signed a union card. Respondent contends that this "difference" makes Mauer's testimony that Mauer was asked such a question incredible. This contention is rejected. First, there is nothing particularly incredible over the fact that different individual interrogations might be conducted differently. See *A/Z Electric,* supra. Indeed, Farrell admitted that the individual meetings were handled differently for each employee.[59] Second, the difference cited by the Respondent is only in form, not substance. Farrell did "ask" Bardic whether he had signed a union card, but she did it in a much more subtle, if not more threatening, fashion than the direct question she posed to Mauer.

For all of the foregoing reasons, I conclude that the Respondent violated Section 8(a)(1) of the Act in the interrogations conducted by Farrell on March 27, which were coercive and which interfered with the employees' rights under Section 7.

(3) Threats regarding the futility of union activity during the March 27, 2002 meeting

The Board has consistently held that employers who threaten the futility of selecting a bargaining representative violate Section 8(a)(1) of the Act. *K-Mart Corp*., supra; *Trane Co*., 137 NLRB 1506 (1962).

During the meeting with the Respondent's maintenance mechanics on March 27, Farrell stated that the owner of B & A did not like the Union, did not want the Union, and would not allow it on his property. These are strong statements of antiunion animus. Moreover, the threat that the Union would not be allowed on the property would reasonably convey to the maintenance mechanics that any attempt by them to organize would be frustrated by the Respondent, thereby informing them of the futility of engaging in such organizing activities. *Wellstream Corp*., 313 NLRB 698 (1994); *K-Mart Corp*., supra. The coerciveness of this threat was exacerbated by the other 8(a)(1) violations during the March 27 meetings and the intimidating and threatening circumstances in which the threat was made.

[59] Tr. 354.

For all of the foregoing reasons, I find that Farrell unlawfully threatened the futility of union activity in her statements to the Respondent's maintenance mechanics on March 27, and in doing so violated Section 8(a)(1) of the Act.

(4) Threat to make changes in the employees' terms and conditions of employment if they selected a union to represent them

The General Counsel maintains that Farrell's statement in the March 27 meeting -- that if the Union were to get into the building then management and the owner would have to look at their options -- when considered in conjunction with Farrell's statements regarding the futility of union activity, constitute a threat to make changes in the employees' terms and conditions of employment if they selected a union to represent them. This is a close question, but on balance I conclude that the General Counsel did not sustain his burden of proof.

The statement itself does not threaten any reprisals. Indeed, it is much like a truism. Whenever a change of almost any nature is made in the workplace, management must or would always consider its options. The question is, of course, what are those options that management would consider? One must examine the context in which the statement is made in order to determine whether there is an unlawfully coercive aspect to it. That is, was the statement that management would have to look at its options reasonably understood by the employees, under all the circumstances, to be another way of saying that a likely option is the loss of work or the subcontracting out of work.[60]

The only authority cited by General Counsel in support of its contention that the statement by Farrell constituted a threat to make changes in the employees' terms and conditions of employment if they selected the Union to represent them is *Exceptional Professional, Inc*., 336 NLRB No. 16, slip op. at 19 (2001). This case is inapposite. In *Exceptional Professional*, the employer was found to have made an unlawful threat of a layoff when its supervisor told an employee that he (the supervisor) could not talk about the union or he would be laid off. This statement is unlike any statement made by Farrell on March 27.

The Respondent argues that this charge should be dismissed because there is no supporting evidence. I disagree. The statement that management would consider its options if the Union were to become the representative of the employees is a statement that, under different circumstances, could be found to be coercive and in violation of the Act. Indeed, the circumstances of the present case demonstrate that the meetings and interrogations during which these alleged threats occurred were coercive. As noted, whether the statement constitutes an unlawful threat to change the terms and conditions of employment of the maintenance mechanics if they selected a union to represent them is a close question.

Nevertheless, under the present circumstances, I find that the statement is not coercive and would not be reasonably understood by the employees as being coercive. Farrell did not list what options management would consider, and without more[61], without some listing or intimation of the options management would consider, either expressly or by implication or from

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[60] I mention subcontracting here, not because that is a necessary or reasonable inference from Farrell's statement, but because that issue arises in a statement by Cheryl Metz at the later meeting on April 8, 2002.

[61] See *Garney Morris, Inc*., supra at 115 (where the Respondent's president told the workers that one of his options was to close down the business, "a threat of this nature was a clear violation of Section 8(a)(1) of the Act.")

the circumstances, one would be forced to speculate on whether this was a threat, and if so, what action by management was reasonably contemplated by the threat.[62] The evidence does not establish these crucial elements of this 8(a)(1) charge, and accordingly, I conclude that Farrell's March 27 statement that management would consider its options if the Union were to become the representative of the employees did not violate the Act.

(5) Creating the impression that employees' union activities were under surveillance

The General Counsel alleges that Farrell's statement in the March 27 meeting that she knew that 50 percent of the maintenance staff had signed union cards created an impression of unlawful surveillance because it indicated that the Respondent was closely monitoring the degree of the employees' union involvement.

When an employer creates the impression among its employees that their union activities are being watched or spied on, employees' future union activities and the exercise of their Section 7 rights tend to be inhibited. Accordingly, the creation of the impression of surveillance of union or organizing activities is a violation of Section 8(a)(1) of the Act. *Link Mfg. Co*., 281 NLRB 294 (1986), enfd. mem. 840 F.2d 17 (6th Cir. 1988), cert. denied 488 U.S. 854 (1988).

The test in determining whether a respondent has created an impression of surveillance is whether the employees would reasonably assume from the statement in question that their union activities had been placed under surveillance. *Schrementi Bros., Inc*., 179 NLRB 853 (1969). The smallness of the employer's workplace does not preclude a finding that the employer created an impression of surveillance and the Board does not require that the words used by the employer reveal that it acquired its knowledge by unlawful means. *United Charter Service,* 306 NLRB 150 (1992).

Farrell told the maintenance mechanics, in management's first meeting with the employees after the Union had been at the Building in its initial organizing effort, that she knew that 50 percent of them had signed union cards. She did not explain how she acquired this knowledge or whether it had been obtained voluntarily. *United Charter Service,* supra at 151. There was no evidence that the union cards were signed in public. Indeed, the two employees who presented evidence on this issue stated that they denied that they had signed cards when Farrell had asked them in their individual interrogations, when in fact they had signed such cards. Accordingly, Farrell's statements on their face reasonably suggested to the employees that the Respondent was closely monitoring their union activities. Id.

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[62] I note that *Amptech, Inc*., 2002 WL 1988126 (NLRB Div. of Judges) involved, inter alia, an alleged violation of 8(a)(1) in a speech given by the Respondent's vice president whose family owned the company. In the speech the vice president stated that his family felt that the workers' attempt to organize was a personal attack on them, and that the "management would consider their options." In finding a violation of 8(a)(1), the judge only relied on the personal attack statement, saying, "it equated the employees' support of the Union to being disloyal to the Company." The judge did not refer to the "management options" statement in his finding of an 8(a)(1) violation. In *Wal-Mart Stores, Inc*., 2002 WL 1667274 (NLRB Div. of Judges), the Respondent's manager gave speeches to employees in which she used notes that she closely followed and which read that in the event of a strike "the company would certainly have to consider its options in keeping the store running and serving our customers." Although several 8(a)(1) violations were charged, no such charge was made regarding the "options" statement.

The Respondent argues that Farrell's statement cannot be considered as an implication of surveillance. In support if its contention, the Respondent relies on *Regal Recycling, Inc*., 329 NLRB 355 (1999), *United Charter Service,* supra, and *Star Trek: The Experience*, 334 NLRB 246 (2001). These decisions do not support the Respondent's argument.

In *Regal Recycling,* the Respondent's supervisor told two employees that he knew who had signed cards for the union. However, immediately after making that statement, the supervisor asked the employees whether they had signed cards. Since the General Counsel was required to prove that the employee would reasonably assume from the statement that surveillance had taken place, the judge found no violation because the "it must have been obvious to the employees that Respondent could not know who signed cards." 329 NLRB at 365. In the present case, Farrell also asked the employees, after she made her statement, to name the employees that had signed the union cards. But Farrell, unlike the supervisor in *Regal Recycling*, never said that she knew who had signed the union cards. Rather, she said she knew that 50% of them had signed cards. Thus, there would be no reason for the employees to doubt the veracity of Farrell's statement simply because she continued to ask, in committing another violation of the Act, who had signed the cards.

In *Star Trek: The Experience*, the judge considered an allegation that the Respondent had created an unlawful impression of surveillance, and although he did not issue a ruling on the allegation, his discussion makes clear that he would dismiss that allegation. See *Star Trek: The Experience*, supra. The Board did not address the surveillance issue in its decision. The surveillance allegation arose from a statement by the Respondent's director of operations to a worker that "he had been made aware that [the worker] was distributing union cards on Star Trek premises and asked that [the worker] refrain from doing so as it was not company policy to disseminate union material on the premises." In considering this issue, the judge noted that mere knowledge of employees' union activity is not sufficient to establish the impression of surveillance. "Thus to tell an employee that the Respondent had heard he was passing out cards, particularly where that activity took place on company property, does not without more make out a violation of the Act. *South Shore Hospital*, 229 NLRB 363 (1977)." While this statement of how the law applies in a particular factual situation is not disputed, I have no occasion to apply it since the facts of the present case regarding the creation of the impression of surveillance have nothing in common with the facts of *Star Trek: The Experience*.

United Charter Service does not support the Respondent's position since the Board held in that case that the supervisor's statements created an unlawful impression of surveillance. The Board also noted in that case that neither the Respondent nor the manager disclosed how he had obtained his knowledge nor did they offer any legitimate ground for making the statements. Similarly, in the present case, neither the Respondent nor Farrell disclosed how she had obtained her knowledge nor did they offer any legitimate ground for the statement made by Farrell. Like the Board in *United Charter Service*, I find that Farrell's "statements on their face reasonably suggested to the employees that the Respondent was closely monitoring the degree and extent of their organizing efforts and activities." 306 NLRB at 151.

Accordingly, I conclude that the Respondent violated Section 8(a)(1) of the Act in the statements made by Farrell on March 27, which unlawfully created the impression of surveillance of the workers' organizing activities and which interfered with the employees' rights under Section 7.

c. *Meeting on April 8, 2002*

(1) Threat to subcontract the employees' work if they selected a union to represent them

Section 8(c) of the Act protects the expression of views, argument or opinion as long as "such expression contains no threat of reprisal or force or promise of benefit." Thus, an employer's right to free speech must be balanced against the employees' right to organize free from coercion, restraint and interference. In determining whether an employer's prediction concerning the closing, partial closing, or transferring of its business is a permissible prediction protected by Section 8(c) or is an unlawful threat in violation of the employees' Section 7 rights, the Supreme Court provided the following guidance in *NLRB v. Gissel Packing Co*., 395 U.S. 575, 618 (1969):

> [A]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.' He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in the case of unionization. [Citation omitted.] If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion…

On April 8, Metz told the maintenance staff that if the Union came in, the Building would be considered overstaffed according to union rules. Therefore, management would have to determine the maintenance staff to keep and the maintenance staff that would no longer work in the Building. She said that the owner would keep one engineer and two maintenance mechanics, and the rest of the work would be contracted out.

This statement by Metz is a direct prediction and threat that if the employees were to select the Union as their representative, jobs would be lost and maintenance mechanics would be laid off. When the statement is considered against the background of the antiunion statements previously made by Farrell as well as the antiunion statements made by Metz at the April 8 meeting, the conclusion that the statement constitutes a direct and unlawful threat is even more clear and compelling.

The Respondent makes no legal argument regarding this direct threat because it claims that Mauer's testimony is "incredible" and that Metz "simply stated that she had put herself personally on the line by eliminating subcontracting." (Respondent's Posthearing Br., pp. 62-63). Since I have credited Mauer's testimony in this regard, and since Metz' testimony is partially consistent with Mauer's, Respondent's factual argument is rejected. In any event, and alternatively, the Respondent's own characterization of Metz' statement also results in that statement being a violation of the Act because her statement equates adherence to the Union with disloyalty to Metz and the employer. *House Calls, Inc*., 304 NLRB 311, 313 (1991).

Accordingly, I conclude that Metz threatened to subcontract the employees' work if they selected a union to represent them, and that this threat violated Section 8(a)(1) of the Act.

(2) Threat to reduce employees' hours of work if they selected a union to represent them

The General Counsel contends that the same statements made by Metz on April 8, as

described above, also constitute a threat to reduce the employees' hours of work if they selected a union to represent them. These statements include the threat that the owner would keep one engineer and two maintenance mechanics, and the rest of the maintenance work at the Building would be contracted out. The Respondent, again discounting Mauer's testimony and the extent to which it was corroborated by Metz, claims that there was no evidence to support this allegation.

I find that Metz' statement that the owner would keep just three maintenance workers (essentially reducing the maintenance staff by more than half), and would subcontract out the remaining work, could and would be reasonably understood by the workers that, in addition to losing jobs, the workers' hours would also be reduced. The Respondent has offered no defense to this threat except to claim that the words constituting the threat were never spoken. Nevertheless, as noted above, I have found that Metz made the statement constituting the threat. Metz stated at the meeting that the Respondent's reason for reducing the workers' hours would be that the Respondent would be considered overstaffed according to union rules. The Respondent made no attempt to explain or to prove the accuracy of this statement at the hearing or at any other time. The threat implied that the Respondent may or may not take action solely on its own initiative or pursuant to the unexplained union rules that apparently only Metz or the Respondent knew about. Accordingly, the threat "is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion." *NLRB v. Gissel Packing Co*., supra.

For all of these reasons, and for the reasons found in concluding that the Respondent violated Section 8(a)(1) in threatening to subcontract work if the employees should elect to be represented by the Union, I find that the Respondent violated Section 8(a)(1) in threatening to reduce its employees' hours of work if they elected to be represented by the Union.

(3) Interrogation of employees about their union activities

In its posthearing Brief, the General Counsel ignores this allegation of the complaint. The Respondent does address this allegation and argues that there is no evidence that Metz interrogated the maintenance mechanics during the April 8 meeting. I agree with the Respondent. There is no evidence that Metz or any other member of management conducted an interrogation of the employees at the meeting on April 8. Accordingly, this allegation should be dismissed.

d. *Meeting of April 19, 2002 - Interrogation of employees about their union activities*

The complaint alleges that Cindy Biogetti, Respondent's general manager, held a meeting at the Building on April 19, during which she unlawfully interrogated the employees. Biogetti testified at the hearing and stated that she did not ask any questions of the employees during the meeting. The General Counsel did not challenge Biogetti on this testimony. Nor did the General Counsel address this allegation in its posthearing brief. Accordingly, I find that Biogetti did not unlawfully interrogate the Respondent's employees in the meeting held on April 19.

2. Section 8(a)(3) - The discharge of Gregory Mauer

(a). *Wright Line analysis*. Under the test set forth in *Wright Line*, supra, the General Counsel has the burden of proving by a preponderance of the evidence that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. To meet this burden, the General Counsel must generally establish four elements. First, the existence of activity

protected by the Act. Second, that the Respondent was aware that the employee had engaged in such activity. Third, that the alleged discriminatee suffered an adverse employment action. Fourth, a motivational link, or nexus, between the employee's protected activity and the adverse employment action. *American Gardens Management Co*., 338 NLRB No. 76 (2002).

The employer's knowledge of the protected activity, step two, may be established through circumstantial evidence. *Montgomery Ward & Co*., 316 NLRB 1248, 1253 (1995), enfd. mem. 97 F.3d 1448 (4th Cir. 1996); *Greco & Haines, Inc*., 306 NLRB 634 (1992). Among the circumstances from which knowledge may be inferred are the timing of the discriminatory action, the employer's general knowledge of union activities, animus, disparate treatment, and when the reasons given for the adverse employment action are false or pretextual. *Montgomery Ward & Co*., supra; *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). Although knowledge may be inferred from any one of these factors, two or more of them frequently conjoin. *North Atlantic Medical Services*, 329 NLRB 85 (1999).

Similarly, antiunion motivation, or the motivational link, may be established indirectly. Indeed, indirect evidence is often the only way in which motivation can be proven since an employer will rarely, if ever, openly acknowledge that an employee was or was being fired because of some reason that the law forbids. *Sahara Las Vegas Corp*., 284 NLRB 337, 347 (1987). In recognition of this plain and pervasive fact, courts have devised alternative methods for a party to prove motivation. See, e.g., *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Wright Line*, supra. Accordingly, and to list just some examples, antiunion motivation may reasonably be inferred from disparate treatment of the alleged discriminatee and other employees, *Holiday Inn East*, 281 NLRB 573, 575 (1986), the timing of the employment action in relation to the protected activity, *Taylor & Gaskin, Inc*., 277 NLRB 563 fn.2 (1985), inconsistent or shifting explanations by the employer for the employment action, *Star Trek; The Experience*, supra; *Master Security Services*, 270 NLRB 543, 552 (1984), the employer's own response to the charges, *Southwest Merchandising Corp., v. NLRB*, 53 F.3d 1334 (D.C. Cir. 1995), and the unexplained failure to produce critical evidence or testimony which would be supportive of the employer's claims, *Cedar Falls Health Care Center*, 276 NLRB 1300, 1303 fn.20 (1985). As this listing demonstrates, motive may be inferred from the total circumstances of the case. *Fluor Daniel, Inc*., 304 NLRB 970 (1991).

Proof of the motivational link may also be established by proof of animus. E.g., *Robert F. Kennedy Medical Center*, 332 NLRB 1536 (2000). Union animus demonstrated by 8(a)(1) violations is a "highly significant factor" in determining motive. *Lemon Drop Inn,* 269 NLRB 1007 (1984). Moreover, it should be kept in mind that this last "factor" of nexus is essentially coterminous with the ultimate question presented, which is whether antiunion sentiment was a substantial or motivating factor in the challenged employer decision.

If the General Counsel satisfies his initial burden under *Wright Line*, the burden then shifts to the employer, in the nature of an affirmative defense, to demonstrate that the same action would have taken place even in the absence of the protected conduct. In meeting this burden, the employer cannot simply state a legitimate reason for the action taken, but rather must persuade by a preponderance of the evidence that it would have taken the same action in the absence of the protected activity. *T & J Trucking Co*., 316 NLRB 771 (1995). Nevertheless, the employer's defense does not fail simply because not all of the evidence supports it, or even because some evidence tends to negate it. *Merrilat Industries*, 307 NLRB 1301, 1303 (1992). The ultimate burden of proving discrimination always remains with the General Counsel. *Wright Line*, supra.

The evidence presented to satisfy the General Counsel's initial burden must be analyzed

separately from the evidence presented in the Respondent's defense. *Pace Industrial*, 320 NLRB 661 (1996), enfd. 118 F.3d 585 (8th Cir. 1997). Nevertheless, the employer's stated reasons for the adverse employment action against an employee can be considered as a part of the General Counsel's initial burden, and if those reasons are pretextual, they can support an inference that the employer had an unlawful motive. *Black Entertainment Television*, 324 NLRB 1161 (1997). The entire record may be examined to ascertain whether the adverse employment action was motivated by union activity. Thus, in determining whether the evidence presented has satisfied the General Counsel's initial burden, the evidence is not limited to the evidence introduced by the General Counsel, but can also include the reasons advanced by the employer for the discharge and any additional evidence offered at the hearing by the Respondent. *American Gardens Management Co*., supra at fn.5; *Williams Contracting*, 309 NLRB 433 (1992). With these principles in mind, I will now consider the facts of the present case under the separate elements of the *Wright Line* analysis.

(1) Adverse employment action and protected activity. The Respondent does not dispute that Gregory Mauer suffered an adverse employment action. The Respondent does dispute that Mauer engaged in protected activity, claiming that there is no evidence to support this allegation other than Mauer's testimony. If this observation were accurate, I would still find that Mauer engaged in protected activity because I have found Mauer to be a credible witness. However, the observation is not accurate since Dan Schlademan, the director of organizing for the Union, also testified about Mauer's protected activities. Schlademan confirmed that he had a discussion with Mauer at the front desk in the Building on March 21 about the Union's organizing campaign, he testified that Mauer signed an authorization card at the front desk, that Art Barajas and Sharon Sharpe saw him and Mauer at the front desk, that he gave additional authorization cards to Mauer in order for him to try to obtain the signatures of other maintenance workers, and that Mauer continued to have dealings with Union officials and to assist the Union after March 21 in conjunction with the Union's efforts to organize the maintenance workers. Clearly, and at a minimum, all of Mauer's actions at the front desk on March 21 were protected activities.[63]

The Respondent argues that a recent Board decision, *The Earthgrains Co.*, 338 NLRB No. 118 (2003), supports the proposition that uncorroborated evidence of alleged protected activity does not meet the standards of proving protected activity as required in step one in the *Wright Line* analysis. This argument has no merit. First, *Wright Line* does not address the quantum of evidence that is required to meet the respective burdens of proof in its analysis,

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[63] The Respondent argues that because no coworkers were called to corroborate Mauer's testimony regarding his additional efforts to solicit them for the union, an adverse inference should be drawn against Mauer's testimony in this regard. As noted, the facts of this case do not meet the criteria for making such an adverse inference. However, even if I were to make such an inference, the Respondent's position, that there is no evidence that Mauer engaged in protected activity, would still fail. Mauer's testimony as to what occurred in the lobby of the Respondent's building, which was corroborated by Schlademan, establishes that Mauer did engage in such activity.

The Respondent also argues that "[a]s far as Sharpe knew, Schlademan could have been any stranger who happened to be in the lobby." (Respondent's Posthearing Br., p. 14.) This disingenuous argument fails to explain why Sharpe and Metz called Farrell and asked her to come to the Building the next week after Schlademan was there. Moreover, Metz testified that she asked Farrell to come to the Building because of the Union's activities. Clearly, Metz and Sharpe knew that Schlademan was associated with the Union, in spite of Sharpe's, but not Metz's, failure to claim any knowledge of union activity.

other than the general, preponderance of the evidence standard applicable to both sides of the controversy. *See American Gardens Management Co*., supra. Second, *The Earthgrains Co.* simply does not support the proposition argued by the Respondent. It is true that the Administrative Law Judge did not accept, under the circumstances of that case, the uncorroborated testimony of a union adherent, named Jenkins, concerning his alleged protected activity. However, this was simply a credibility determination that the judge was particularly qualified to make, similar to credibility determinations made by judges in virtually every case. There are many cases where a judge finds uncorroborated testimony to be credible, and other cases where the opposite is found. To translate the accidental findings in that case into a proposition of law, as Respondent argues, would be no different from arguing that the case also stands for the proposition that all testimony from persons named Jenkins must, as a matter of law, be found to be incredible. The Respondent's argument is rejected.

For the reasons discussed above, including the credited testimony of Mauer and Schlademan, I find that Mauer did engage in protected activity.

(2) Knowledge. The Respondent next argues that there "is no direct or circumstantial evidence" that the Respondent was aware that Mauer had engaged in protected activities. This argument, although recognizing that circumstantial evidence is sufficient to prove knowledge, fails to address the plethora of circumstantial evidence of knowledge that exists in this case, including the following:

(A) Timing. Mauer, who had been an employee for over 18 months, was fired approximately three weeks after the Union appeared at the Building in its organizing campaign. This coincidence supports an inference that the Respondent knew of the Union's organizing efforts and Mauer's involvement in, or sympathies for, such efforts. *U.S. Soil Conditioning Co*., 235 NLRB 762, 764 (1978).

(B) Respondent's general knowledge of union activities. An employer's general knowledge of union activities is at least a factor from which the more specific knowledge element in the *Wright Line* analysis may be inferred. *Montgomery Ward & Co*., supra. Moreover, in appropriate circumstances, such as where there is significant evidence of union animus, an employer's general knowledge of union activities on its property will itself satisfy the knowledge element in the analysis. *Food Cart Market*, 286 NLRB 1016 (1987); *General Iron Corp*., 218 NLRB 770 (1975). The Respondent certainly knew that the Union was engaging in a campaign to organize its maintenance workers. Management saw union officials talking with Mauer in the front lobby of the Building on March 21. Moreover, the Respondent's management held meetings with the maintenance mechanics the next week after this on-site effort by the Union. The Respondent clearly knew about, and was concerned about, the Union's organizing campaign in its Building.

(C) Animus. Animus may be demonstrated solely by the commission of Section 8(a)(1) violations. *Greyston Bakery,* 327 NLRB 433 (1999). In the present case, the Respondent committed Section 8(a)(1) violations by coercively interrogating its employees, creating the impression of surveillance of its employees' union activities, threatening the futility of union activities, threatening to subcontract maintenance work, and threatening to reduce the hours of work of its maintenance workers.

Animus may also be found in statements by a supervisor that she felt betrayed by the employees' protected activity. *Robert F. Kennedy Medical Center*, supra. In *Robert F. Kennedy Medical Center*, the Board affirmed the finding that the Respondent violated Section 8(a)(1) of the Act in firing three employees where the only evidence of animus was a statement by the

Respondent's director that she felt betrayed by the employees' protected activity. In the present case, the Respondent's supervisor, Metz, made a similar statement in which she equated adherence to the Union with disloyalty to her and the employer.

Moreover, there is direct evidence of the Respondent's antiunion animus. At the meetings held in March and April, both Farrell and Metz told the maintenance mechanics that the owner of the Building did not like unions, did not want unions, and would not allow unions onto the Building's property. Accordingly, I conclude that the Respondent harbored an antiunion animus.

(D) Pretext. The reasons offered by the Respondent to explain why Mauer was fired were pretextual. Moreover, evidence of pretext is alone sufficient to establish knowledge. *Montgomery Ward & Co*., supra. My analysis and explanation of pretext is set forth below in the discussion of the fourth step in the *Wright Line* analysis. For the present, I simply note that the Respondent's reasons were pretextual. Accordingly, this is another basis on which to support my conclusion that the Respondent had knowledge of Mauer's union activities or sympathies.

(E) Direct evidence. The Respondent knew from Mauer's resume and his employment interview conducted by Biogetti that Mauer was and had been a union worker, and had received all of his schooling for the maintenance job at the Building job through the union.[64] This knowledge prompted Biogetti's warning to Mauer, when he was hired, that the Respondent was not a union company, to which Mauer responded, "That's fine." Accordingly, there is direct evidence to show that the Respondent knew of Mauer's sympathies for the Union.

(F) Small plant doctrine. The Respondent argues that knowledge of Mauer's protected activities cannot be inferred under the Board's small plant doctrine. The Respondent cites *Friendly Markets, Inc*., 224 NLRB 967 (1976) for the proposition that there are two elements to the small plant doctrine: (1) the small size of the employer's facility, and (2) evidence showing that the union activities were carried on in an open manner. The Respondent argues that the second element has not been proven. The Respondent is correct in citing the elements to the small plant doctrine, but the Respondent again fails to account for all of the evidence in the present case.

This evidence demonstrates that Mauer's union activities, at least initially on the day the Union came to the Building, were carried out openly. The mere fact that Mauer wanted to keep quiet his conversation with Schlademan does not alter the openness of their meeting nor of Mauer's sympathies with and interest in the Union. In other words, simply because some union activities were intended to be hidden does not mean that all union activities were hidden. The

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[64] The Respondent claims that Mauer's testimony, that he had received all his schooling for the job from the union, is contradicted by Mauer's resume. The Respondent cites Mauer's Associates Degree in Agricultural Management from the Wilmar Vocational Tech. as an example of schooling that was "not Union training facilities." (Respondent's Posthearing Br., p. 15; GC Exh. 9.) The Respondent's factual argument is misplaced. The Respondent confounds "all schooling" with "all schooling for the job." The fact that Mauer may have received some schooling in his life that would not help him to qualify for the maintenance job with the Respondent does not contradict his testimony. Indeed, Mauer may have received much schooling of this nature. Social studies in elementary and high school come immediately to mind. In any event, the import of Mauer's testimony was that all of the schooling he had received relating to the job he was seeking with the Respondent was received from the union. His resume does not contradict this testimony.

evidence shows that at least some union activities were done openly and in the presence of management.

In *La Gloria Oil and Gas Co*., 337 NLRB No. 177, 2002 WL 1881217 (2002), a driver told his supervisor that the other drivers had a meeting with a union representative, and that they had decided to "go union." However, the drivers who were at the meeting were not identified to the supervisor. In applying the small plant doctrine, the Board stated that

> Given the small size of the work force (consisting of approximately 14 drivers), it can reasonably be inferred that Fuller [the supervisor] was aware of the identity of the employees involved in the union activity.

2002 WL 1881217, *6. The size of the Respondent's work force in the present case is approximately half the size of the work force in *La Gloria*. Moreover, there is direct evidence in the present case of management's knowledge of Mauer's sympathies and of his open discussion with the Union's organizer in the Building's front lobby. In accordance with the small plant doctrine, and consistent with the Board's holding in *La Gloria Oil and Gas Co*., supra, I also infer that the Respondent had knowledge of Mauer's additional efforts to have coworkers sign union cards.[65]

(G) Credibility. As noted above, I have found that Metz was not credible when she stated that she did not discover that Mauer was associated with the Union until after he had been fired. I found that this testimony was not credible on various grounds, including the demeanor of Metz.

This credibility determination also permits an inference that the opposite of Metz' testimony is the truth. As the Supreme Court observed in *NLRB v. Walton Mfg. Co*., supra at 408 (1962), quoting from *Dyer v. MacDougall*, 201 F.2d 265, 269 (2d Cir. 1952), the demeanor of a witness

> may satisfy the tribunal, not only that the witness' testimony is not true, but that the truth is the opposite of his story; for the denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies.

Based on all of the foregoing reasons and evidence, including timing, general knowledge of union activity, animus, pretext, direct evidence, and inferences from the size and number of workers at the Building, I conclude that the Respondent had knowledge of Mauer's union activities as well as his union sympathies. Moreover, because Metz' denial of knowledge of Mauer's union activities convinces me that the opposite is the truth, I find that the Respondent knew that Mauer was associated with the union at the time the Respondent fired him.

(3) Motivational link or nexus. The Respondent also disputes the fourth and last step in the *Wright Line* analysis, which is a motivational link, or nexus, between the employee's protected activity and the adverse employment action. My analysis of whether the General Counsel has proven a motivational link or nexus is part and parcel of my analysis of pretext

[65] Of course, this specific knowledge is not a prerequisite to my conclusion that the Respondent had knowledge of Mauer's union activity and sympathies. However, it does constitute an additional and an independent reason in support of this conclusion.

because of the symbiotic and synergistic relationship between those elements.[66]

Evidence that permits an inference of knowledge is often the same evidence allowing an inference that the company was motivated by antiunion animus. *NLRB v. Health Care Logistics*, 784 F.2d 232 (6th Cir. 1986). Thus, the Board has held that "[t]he same set of circumstances may be relied on to support both an inference of knowledge and an inference of discrimination." *North Atlantic Medical Services*, supra at fn. 9, *quoting Coca-Cola Bottling Co. of Miami*, 237 NLRB 936, 944 (1978). However, because knowledge is a different mental and emotional trait than motivation, the same evidence that is used to establish these factors may have a different impact in such proof. For example, while timing may not be sufficient, alone, to establish knowledge, *see Amber Foods, Inc*., 338 NLRB No. 84 (2002); *Metro Networks, Inc*., 336 NLRB No. 3 (2001), it may, alone, support a finding of antiunion animus as a motivating factor in an employer's action. *NLRB v. Rainware, Inc*., 732 F.2d 1349, 1354 (7th Cir. 1984). Moreover, evidence that could have been, but was not, previously considered with respect to the knowledge element may be evaluated here in determining the Respondent's motivation. Such evidence includes disparate treatment of the discharged employee compared to other employees with similar work records or offenses, *NLRB v. E. I. Du Pont*, 750 F.2d 524, 528-529 (6th Cir. 1984), as well as the reasons given by the Respondent for the discharge and whether those reasons were the true reasons for the Respondent's action. *Lemon Drop Inn,* supra at 1018; *Darbar Indian Restaurant*, 288 NLRB 545 (1988).

The first indication of the Respondent's intent to fire Mauer is found in the memorandum prepared by Metz on April 12 and sent to Nancy Farrell. In this memorandum, Metz proposes that Mauer be fired "with expediency" even though he had not previously been threatened with discharge or warned that discharge was even being contemplated. Metz bases her intent to fire Mauer, in part, on his alleged poor performance in the past. She states in the memorandum that Mauer "is unable and unwilling to complete work assignments, he is unwilling to follow direction, and has failed to reach reasonable expectations for this position." The evidence does not support the truthfulness of these statements. The Respondent did not even try to prove at the hearing that Mauer was "unwilling" to complete work assignments or to follow direction. Moreover, even if the Respondent had attempted to prove these allegations, such an "attitude" problem would not have warranted firing, at least under Farrell's stated method of dealing with employees with attitude problems. In addition, Mauer had achieved reasonable expectations for his position, and this achievement is reflected in the only management evaluation of Mauer's performance, which was done by Metz in October 2001, before the Union embarked on its organizing campaign at the Respondent's buildings. Accordingly, I find that the reasons listed by Metz as the cause, at least in part, for her recommendation that Mauer be fired are false.

Metz also states in her memorandum that work tickets relating to the March 28 situation were attached to the memorandum. However, the memorandum offered by the Respondent and received into evidence at the hearing had no work tickets attached to it, and neither Farrell nor Metz was able to identify what those tickets were. In addition, there were no work tickets or any other documentation or specification in or attached to the memorandum delineating any previous instances of poor performance by Mauer.

Metz acknowledges in the memorandum that Matica was with Mauer while they tried to

[66] Symbiotic, because proof of a motivational link may constitute part of the proof of pretext, and vice versa. *Black Entertainment Television*, supra. Synergistic, because the combined effect of proving both elements may constitute proof of the ultimate issue to be decided, i.e., whether the Respondent discriminatorily fired Mauer in violation of Section 8(a)(3).

fix the leak and associated problems during the evening of March 28, but that she will only give a warning notice to Matica "because of his minimum time working in the building." However, Matica's personnel file does not reflect that he was even given a warning notice.

Metz claims that she allegedly had two areas of concern regarding Mauer's performance on March 28: the resident's apartment was left a mess (a lack of respect for the apartment), and the inability to control and limit the leak. Metz also testified that she decided to only give Matica a warning notice because he was merely a back-up to Mauer that evening, and because he had not been working at the building for very long. In fact, these "reasons" provide no basis on which to differentiate between Mauer and Matica for purposes of discipline.

If, in fact, the resident's apartment was left a mess, it should not matter at all whether Matica had been working in the Building for several weeks or several years. Surely, Matica should be able to recognize a mess without regard to how long he worked at the Building. And just as surely, Matica should be just as qualified to clean up a mess without regard to how long he had been working at the Building. Therefore, if there was a mess, and if any discipline was appropriate because some of the mess remained after Mauer and Matica had finished that evening, there is no basis on which to distinguish the discipline to be given to Mauer or Matica. With respect to Metz' second alleged concern regarding Mauer's performance -- the inability to control the leak -- Matica had just previously been the Lead Mechanic at another of Respondent's buildings, and had worked at the Respondent's buildings longer than Mauer had. Nevertheless, and in spite of this experience and responsibility, Matica failed to take any measures to contain or control the leak. Moreover, another maintenance mechanic, Freddy Gist, was assigned to fix the leak the next day, March 29, but he failed to do so. Gist did not receive any discipline for his failure to fix the leak. On March 30, another maintenance mechanic, Bardic, was assigned to fix the leak, and he was unable to fix it. Bardic also received no discipline for his failure to fix the leak.

These facts lead to two compelling conclusions. One, there was no legitimate basis on which to substantially distinguish between Matica and Mauer in the discipline, if any, that should have been imposed, yet there was a striking disparity in the discipline that in fact was imposed. Two, Mauer was treated differently from other maintenance mechanics with respect to the inability to fix the leak that occurred in Apartment 6M. None of these four maintenance mechanics (Gist, Bardic, Matica and Mauer) were apparently able to fix the leak. Mauer was the only mechanic to be disciplined, and he was fired.

Disparate treatment of similarly situated employees supports an inference of unlawful motivation. *Naomi Knitting Plant*, 328 NLRB 1279 (1999). Although Mauer's actions with respect to the March 28 leak were somewhat different from those of Gist, Bardic and Matica, his alleged failures were not so different as to warrant the extraordinary differences in treatment that the Respondent imposed. Moreover, the difference asserted by Metz in her memorandum between Matica and Mauer does not withstand analysis. Accordingly, I conclude that the Respondent disparately treated Mauer as opposed to other maintenance mechanics, mechanics who had no known connection with or sympathies for the Union, and that this disparate treatment supports an inference of unlawful motivation by Respondent and that the Respondent discriminated against Mauer on the basis of union sympathies and activity.

Evidence of a departure from past practices supports an inference of animus and discriminatory motivation. *Sunbelt Enterprises*, 285 NLRB 1153 (1987). Similarly, actions by an employer in derogation of its own employee handbook also support an inference of unlawful motivation. *Lampi LLC*, 327 NLRB 222 (1998).

The firing of Mauer and the way it was handled were contrary to the provisions of the Respondent's employee handbook. Assuming that Mauer was fired for previous performance problems and for his failure to fix the leak and clean up the mess on March 28,[67] such matters would clearly constitute performance issues. Discharges on account of performance are covered in the employee handbook under "Policy on Termination." That policy states that performance issues deserve "special consideration," and that the Respondent "would like to insure that every reasonable step has been taken to help the employee continue in productive capacity." Such steps include making the employee aware of the problem, making suggestions in writing as to how those problems can be eliminated, a joint evaluation between the employee and the manager, and giving the employee sufficient time to remedy the situation. The handbook also recommends alternatives to discharge, including reassignment to a different job and changing to a position of lesser responsibility. [68]

After March 28, no one from management spoke to Mauer about any alleged performance problem. No suggestions were made to him, whether in writing or orally, as to how any problems could be eliminated. No joint evaluation between Mauer and Metz or Sharpe or Barajas was made or attempted. No time was given to Mauer in which to remedy the situation. No alternatives were offered to Mauer, such as reassigning him from his important duties of doing the pre-occupancy work, work that Metz had claimed was so important to the Respondent's business. (An example of a reassignment or transfer of a different employee is Matica's transfer from Respondent's building at 14 West Elm Street to Respondent's 1400 Lake Shore Drive building after Matica's misconduct at that building.) In short, none of the provisions or recommendations contained in the employee handbook was followed in the firing of Mauer.

In the handling of Gregory Mauer's discharge, and based on the alleged reasons of performance and absenteeism, the Respondent acted contrary to the provisions of, and departed from its past practice of following, its employee handbook. Because of the Respondent's actions in derogation of its employee handbook and its departure from past practices, together with the other circumstances set forth herein, I infer that the Respondent discharged Mauer because of Mauer's union activities and sympathies.

Other factors that support an inference of animus and discriminatory motivation are the abruptness of the adverse action and the failure to conduct a full and fair investigation. *Dynabil Industries,* 330 NLRB 360 (1999); *Firestone Textile Co*., 203 NLRB 89 (1975). In the present case, Mauer's discharge, at least as far as Mauer was concerned, was beyond abrupt. The decision had been made before Mauer was even notified that the matter was under consideration. Mauer was notified on April 15 that he was fired, and he was then escorted out of the building. The Respondent made no attempt, even at that late time, to obtain any input or defense or explanation from Mauer. The decision had already been made.

Moreover, the Respondent failed to conduct an investigation into the matter. It did not seek or obtain statements from Mauer, Matica, the resident in apartment 6M,[69] the front desk

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[67] The inability to know exactly the basis or bases for Mauer's firing, because of shifting and inconsistent explanations, is another, independent ground to support the conclusion that the Respondent's explanation is pretextual. See below.

[68] GC Exh. 20, pp. 20-21.

[69] Metz testified that the resident complained to her the next day, and she then put the resident into another apartment. However, Mauer testified that after he was given the authority from Sharon Sharpe in the evening of March 28, he advised the resident that another apartment was available, but the resident declined. The apparent discrepancy between these assertions

Continued

person, or anyone else. By failing to conduct an investigation, the Respondent demonstrated that it was not concerned with the propriety or fairness of its contemplated action, which was the discharge of Mauer, but was concerned only with an excuse upon which it could rely in taking the action it had already decided to take—to get rid of Mauer.

Unlawful motivation is also found when an employer makes shifting or inconsistent statements to explain an adverse employment action. *Black Entertainment Television*, supra; *Atlantic Limousine*, 316 NLRB 822 (1995). Farrell testified that Mauer did not ask and she did not give an explanation why he was being discharged. On the other hand, Metz testified that Farrell did tell Mauer why he was being fired. Metz testified that Mauer was fired because of performance problems and absenteeism, in spite of the fact that the memorandum prepared by Metz advocating Mauer's discharge makes no mention of absenteeism. Farrell testified that Mauer was discharged only for performance problems. However, when Farrell was asked to identify the provision of the employee handbook under which Mauer was fired, she identified a section of the handbook dealing with misconduct offenses, not performance problems. Another example of inconsistent and shifting explanations is Metz' testimony that she did not approve Mauer's absence from work on March 29.[70] This denial is contradicted by the Respondent's acknowledgement in its Position Statement that Metz had approved Mauer's absence from work on March 29.[71] All of the shifting and inconsistent explanations shown in this record are further evidence of motive and of pretext. *Atlantic Limousine*, supra.

In concluding my analysis of the factors and reasons that demonstrate the Respondent fired Mauer because of his union activities and the Respondent's perception of his union activities and sympathies, I also note the timing of the discharge and the Respondent's animus, both of which were discussed above. In addition, Mauer was fired during the same period when the Respondent was committing other violations of the Act. As the Board stated in *Electronic Data Systems Corp*., 305 NLRB 219 (1991):

> Here the Respondent had knowledge of union activity and, concurrent with the union activity, took action adverse to the employees involved. Implementation of the new reporting procedure was not an isolated event but, instead, occurred in an atmosphere of other unfair labor practices. Even without direct evidence, the Board may infer animus from all the circumstances. [Citations omitted]. Accordingly, we find sufficient evidence to warrant an inference of the Respondent's unlawful motive."

Similarly, in the present case, the Respondent had knowledge of union activity, and within three weeks of the Union's initial organizing effort it fired the one mechanic who was most sympathetic toward, and who had agreed to assist, the union. Moreover, the Respondent accomplished that firing in the circumstances previously noted and in an atmosphere of other unfair labor practices.

Accordingly, I find that the reasons asserted by the Respondent for its firing of Mauer are not the true reasons for its action. From this and from all of the foregoing findings, I conclude that the reason the Respondent fired Mauer was because of his union activities and sympathies. *Williams Contracting, Inc*., supra; *Shattuck Denn Mining Corp. v. NLRB*, supra.

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could have been resolved or at least addressed if the Respondent had conducted a full and fair investigation.

[70] Tr. 551.

[71] GC Exh. 2, p. 5.

My determination that the reasons advanced by the Respondent for its firing of Mauer are a pretext for its actual motive in taking that action necessarily means that the asserted reasons were not relied on. Accordingly, there is no need to further address these reasons because a finding of pretext "leav[es] intact the inference of wrongful motive established by the General Counsel." *Limestone Apparel Corp*., 255 NLRB 722 (1981). However, because the reasons advanced by the Respondent have a facial validity (and, of course, it would be the rare case where the pretextual reason did not have a facial validity), I will briefly address an outstanding question regarding Mauer's job performance, viz., the broken boiler.

When Barajas authorized Mauer to shut off the water in the Building, Barajas also told him to shut off the pumps. I credit Barajas' testimony in this regard because it would have been proper and natural for the lead mechanic to tell or remind Mauer of this safety factor with the water about to be shut off. Barajas told Mauer to shut off the pumps because the pumps are not supposed to run dry, i.e., damage results when water pumps are allowed to operate with no water running through the pumps. Mauer, however, neglected to shut off the pumps with the result that a new pump had to be purchased at a cost of $1076.98.

This neglect in failing to shut off the pumps is a reflection of poor performance by Mauer. Nevertheless, it is not a matter that the Respondent in fact relied on in deciding to fire Mauer. For all of the reasons noted above with respect to knowledge, pretext and animus, I conclude that the Respondent would not have fired Mauer for this performance issue. In reaching my conclusion, I also rely on the Respondent's employee handbook, which the Respondent follows as a general rule in dealing with its employees. The employee handbook delineates a number of alternatives that the supervisor should consider and attempt before deciding to terminate. Thus, assuming that Mauer's performance in neglecting to shut off the water pumps was a matter that management would have addressed, management would have addressed it by discussing the matter with Mauer, offering suggestions, giving Mauer sufficient time to remedy the situation, and all of the other steps recommended in the employee handbook. Instead, management took none of the steps recommended in the handbook.

When an employer attempts to prove its affirmative defense to a charge of discrimination under Section 8(a)(3), it must prove that it would have taken the same action in the absence of protected activity, not that it could have taken such action or that it otherwise had a legitimate reason for the action. *T & J Trucking Co*., supra; *Dynabil Industries*, supra; *Roure Bertrand Dupont, Inc*., 271 NLRB 443 (1981). The evidence shows that the Respondent would not have taken the same action in the absence of Mauer's protected activities.

For all of the foregoing reasons, I conclude that the Respondent discriminated against Gregory Mauer and violated Section 8(a)(3) and (1) of the Act when it fired Mauer because of his protected activities.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by unlawfully interrogating its employees, threatening that its employees' organizing activities were futile, creating the impression that its employees' union activities were under surveillance, threatening to

subcontract the employees' work if they selected a union to represent them, and threatening to reduce their hours of work if they selected a union to represent them.

4. The Respondent violated Section 8(a)(1) and (3) by discharging its employee, Gregory Mauer.

5. The foregoing violations constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent unlawfully discharged Gregory Mauer, I shall order that the Respondent offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of discharge to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[72]

ORDER

The Respondent, B & A Associates, LLC, Schaumburg, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unlawfully interrogating its employees about their union activities or in any other manner interrogating its employees in violation of the Act.

(b) Unlawfully threatening that its employees' organizing activities would be futile.

(c) Unlawfully monitoring or creating the impression of surveillance of its employees' union activities.

(d) Unlawfully threatening to subcontract its employees' work if they selected a union to represent them.

(e) Unlawfully threatening to reduce its employees' hours of work if they selected a union to represent them.

[72] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(f) Discharging or otherwise discriminating against any employee for supporting the Service Employees International Union, Local 1, AFL–CIO, or any other union.

(g) Or in any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Gregory Mauer full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Gregory Mauer whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify Gregory Mauer in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility at 1400 Lake Shore Drive, Chicago, Illinois copies of the attached notice marked "Appendix."[73] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 27, 2002.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[73] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted By Order Of The National Labor Relations Board" shall read "Posted Pursuant To A Judgment Of The United States Court Of Appeals Enforcing An Order Of The National Labor Relations Board."

It Is Further Ordered that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. May 28, 2003

Joseph Gontram
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

We Will Not discharge or otherwise discriminate against any of you for supporting the Service Employees International Union, Local 1, AFL–CIO, or any other union.

We Will Not coercively question you about your union support or activities.

We Will Not monitor or create the impression of surveillance of your union activities.

We Will Not make threats regarding the futility of engaging in organizing or union activity.

We Will Not threaten to subcontract your work if you select a union to represent you.

We Will Not threaten to reduce your hours of work if you select a union to represent you.

We Will Not in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

We Will, within 14 days from the date of the Board's Order, offer Gregory Mauer full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

We Will make Gregory Mauer whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

We Will, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Gregory Mauer, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

B & A Associates, LLC

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

200 West Adams Street, Suite 800
Chicago, Illinois 60606-5208
Hours: 8:30 a.m. – 5 p.m.
Telephone: 312-353-7570

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER AT 200 WEST ADAMS STREET, SUITE 800, CHICAGO, ILLINOIS 60606-5208, TELEPHONE 312-353-7570.